Hearing Date: July 7, 2011 at 1:00 p.m. (ET)
Objection Deadline: July 5, 2011 at 12:00 p.m. (ET)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
TERRESTAR NETWORKS INC., *et al.*,[1]	)	Case No. 10-15446 (SHL)
Debtors.	)	Jointly Administered

NOTICE OF HEARING ON DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO ENTER INTO THE EIGHTH AMENDMENT TO THEIR DEBTOR-IN-POSSESSION LOAN AGREEMENT TO (A) INCREASE THE AMOUNT OF THE COMMITMENT THEREUNDER UNTIL THE FUNDING DATE OF THE PROPOSED SALE TRANSACTION AND (B) EXTEND THE MATURITY DATE

PLEASE TAKE NOTICE that on June 14, 2011, the above-captioned debtors and debtors in possession (collectively, the "***Debtors***") filed the *Debtors' Motion for Entry of an Order Authorizing the Debtors to Enter into an Eighth Amendment to their Debtor-in-Possession Loan Agreement to (a) Increase the Amount of the Commitment Thereunder Until the Funding Date of the Proposed Sale Transaction and (b) Extend the Maturity Date* (the "***Motion***").

PLEASE TAKE FURTHER NOTICE that a hearing (the "*Hearing*") to consider the Motion, if necessary (as further described in the Motion), shall be held before the

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer identification number, are: TerreStar Networks Inc. (3931); TerreStar License Inc. (6537); TerreStar National Services Inc. (6319); TerreStar Networks Holdings (Canada) Inc. (1337); TerreStar Networks (Canada) Inc. (8766) and 0887729 B.C. Ltd. (1345).

Honorable Sean H. Lane of the United States Bankruptcy Court for the Southern District of New York (the "*Bankruptcy Court*"), Alexander Hamilton Custom House, One Bowling Green, New York, New York 10004 on July 7, 2011 at 1:00 p.m. (prevailing Eastern Time).

PLEASE TAKE FURTHER NOTICE that any responses to the Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and the Bankruptcy Court's Order Pursuant to Sections 105(a) and (d) of the Bankruptcy Code and Bankruptcy Rules 1015(c), 2002(m) and 9007 Implementing Certain Notice and Case Management Procedures [Docket No. 60] (the "***Case Management Order***"), shall be filed with the Bankruptcy Court either (a) electronically in accordance with General Order M-399 (which can be found at http://www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's filing system, or (b) on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers), in accordance with General Order M-182 (which can be found at http://www.nysb.uscourts.gov), and shall be served in accordance with General Order M-399 on: (a) counsel to the Debtors, Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, New York 10036, Attn: Ira S. Dizengoff, Esq. and Arik Preis, Esq.; (b) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004, Attn: Susan Golden, Trial Attorney; (c) Otterbourg, Steindler, Houston & Rosen, P.C., as counsel to the statutory committee of unsecured creditors appointed in these chapter 11 cases; (d) Bank of New York Mellon as agent for the Debtors' postpetition debtor-in-possession financing; (e) Emmet, Marvin & Martin, LLP as counsel to the agent for the Debtors' postpetition debtor-in-possession financing; (f) U.S. Bank National Association as Collateral Agent for the Debtors' purchase money credit facility; (g) Weil, Gotshal & Manges

LLP as counsel to Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P.; (h) Willkie Farr & Gallagher LLP as counsel to EchoStar Corporation in its capacity as Lender under the Debtors' purchase money credit facility and Initial Lender under the Debtors' postpetition debtor-in-possession financing; (i) U.S. Bank National Association as Indenture Trustee for the Debtors' 15% Senior Secured Notes and Kelley Drye & Warren LLP as counsel to the Indenture Trustee; (j) Deutsche Bank National Trust Company as Indenture Trustee for the Debtors' 6.5% Senior Exchangeable Notes and Foley & Lardner LLP as counsel to the Indenture Trustee; (k) Quinn Emanuel Urquhart & Sullivan, LLP as counsel to certain holders of the Debtors' 6.5% Senior Exchangeable Notes; (l) the Internal Revenue Service; (m) the Securities and Exchange Commission; (n) the United States Attorney for the Southern District of New York; (o) the Federal Communications Commission; (p) Industry Canada; (q) Kirkland & Ellis LLP, as counsel to certain holders of the Debtors' 15% Senior Secured Notes; (r) K&L Gates, as counsel to Sprint Nextel Corporation and (s) parties in interest who have filed a notice of appearance in these cases pursuant to Bankruptcy Rule 2002, in each case so as to be received no later than **July 5, 2011 at 12:00 p.m. (prevailing Eastern time)** (the "***Response Deadline***").

PLEASE TAKE FURTHER NOTICE that if no responses with respect to the Motion are timely filed and served in accordance with the Case Management Order, the Debtors may, on or after the Response Deadline, submit to the Bankruptcy Court an order substantially in the

form of the proposed order annexed to the Motion, which order may be entered with no further notice or opportunity to be heard offered to any party.

New York, New York
Dated: June 14, 2011

/s/ Ira S. Dizengoff

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
TERRESTAR NETWORKS INC., *et al.*,[1]	Case No. 10-15446 (SHL)
Debtors.	Jointly Administered

DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO ENTER INTO THE EIGHTH AMENDMENT TO THEIR DEBTOR-IN-POSSESSION LOAN AGREEMENT TO (A) INCREASE THE AMOUNT OF THE COMMITMENT THEREUNDER UNTIL THE FUNDING DATE OF THE PROPOSED SALE TRANSACTION AND (B) EXTEND THE MATURITY DATE

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer-identification number, are: TerreStar Networks Inc. (3931), TerreStar License Inc. (6537), TerreStar National Services Inc. (6319), TerreStar Networks Holdings (Canada) Inc. (1337), TerreStar Networks (Canada) Inc. (8766); and 0887729 B.C. Ltd. (1345).

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The above-captioned debtors and debtors in possession (collectively, the "***Debtors***") seek entry of an order, substantially in the form attached hereto as Exhibit A, authorizing the Debtors to enter into an eighth amendment (as described in more detail below, the "***Eighth Amendment***") to the DIP Financing Agreement (defined below). In support of this motion, the Debtors respectfully state as follows:

Preliminary Statement[2]

1. Concurrently herewith, the Debtors have filed a motion (the "***Stalking Horse Motion***") to enter into a Stalking Horse Purchase Agreement with the Purchaser, pursuant to which the Purchaser would provide the Debtors $1.375 billion in cash and the assumption of certain liabilities (the "***Stalking Horse Bid***" or the "***Purchase Price***"), in exchange for substantially all of the Debtors' Assets. By this motion, the Debtors seek authority, which may ultimately not be required depending upon the outcome of the Auction, to enter into the Eighth Amendment (a copy of which, in substantially final form, is attached hereto as Exhibit B) to their DIP Financing Agreement. As discussed further herein, the Eighth Amendment will extend the DIP Maturity Date to September 30, 2011 and increase the amount of the Commitment under the DIP Financing Agreement to $90 million to provide the Debtors with sufficient financing to maintain daily and chapter 11 operations for the period between entry of the Sale Order and the Funding Date associated with the sale of all or substantially all of the Debtors' Assets to Gamma Acquisition L.L.C. (the "***Purchaser***" or the "***Stalking Horse Bidder***") and, solely for the purposes of Section 6.19 of the Purchase Agreement, DISH Network Corporation.

2. In the Sale Motion, the Debtors indicated that they would require incremental debtor-in-possession financing to be provided in the event their auction and sale process

[2] Capitalized terms used but not defined in the Preliminary Statement shall have the meanings ascribed below.

extended beyond the current maturity of their DIP Financing Agreement. Unless amended, the DIP Financing Agreement matures on July 19, 2011 (the "***DIP Maturity Date***"). EchoStar has agreed that if the Stalking Horse Bidder is the Successful Bidder at the Auction,[3] EchoStar will enter into the Eighth Amendment to bridge the Debtors' liquidity needs from the date of entry of the Sale Order to the Funding Date. To effectuate this result, the Debtors seek the relief requested herein and to have this motion heard at the Sale Hearing should the Stalking Horse Bidder be the Successful Bidder at the Auction.[4] As set forth in greater detail herein, the Debtors respectfully submit that entering into the Eighth Amendment is an exercise of the Debtors' sound business judgment and should be approved.

Jurisdiction

3. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

4. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The bases for the relief requested herein are sections 363 and 364 of title 11 of the United States Code (the "***Bankruptcy Code***").

Background

6. On October 19, 2010 (the "***Petition Date***"), each of the Debtors filed a petition with this Court under chapter 11 of the Bankruptcy Code.[5] The Debtors are operating their

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3 *See* Section 6.18 of the Purchase Agreement.

4 For the avoidance of doubt, the Debtors will only seek approval of this motion to the extent the Purchaser is the winner at the Auction; if the Purchaser is not the winner at the Auction, the Debtors may withdraw this motion and seek approval to enter into a replacement debtor in possession financing facility with another party, as needed.

5 Also on October 19, 2010, TerreStar New York Inc., Motient Communications Inc., Motient Holdings Inc., Motient License Inc., Motient Services Inc., Motient Ventures Holding Inc., and MVH Holdings Inc. (collectively, the "***Non-TSN Debtors***") each filed a petition for relief under chapter 11 of the Bankruptcy Code. On October 20, 2010, the Court entered an order providing for joint administration, for procedural purposes, of the Debtors' cases (the "***Joint Administration Order***"), which at that time included the Non-TSN Debtors.

businesses and managing their property as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.[6] No request for the appointment of a trustee or examiner has been made in these chapter 11 cases.

Basis For Relief

A. The Debtors' Entry into the DIP Financing Agreement

7. On the Petition Date, the Debtors filed a motion (the "***DIP Motion***")[7] seeking authorization to enter into an aggregate $75 million senior secured debtor-in-possession financing facility by and among TerreStar Networks Inc., ("***TSN***"), as borrower, The Bank of New York Mellon, as Administrative and Collateral Agent (the "***DIP Agent***"), each of the Debtors other than the Borrower (the "***Guarantors***")[8] and EchoStar, as Initial Lender (together with the DIP Agent, the "***DIP Financing Lenders***") (as amended from time to time, the "***DIP Financing Agreement***"). The DIP Financing Agreement is secured by a first lien on all of the Debtors' Assets, subject to, inter alia, the liens of holders of the Debtors' 15% Senior Secured Notes and the lenders under the Debtors' purchase money credit agreement. On November 18, 2010, the Court approved the DIP Financing Agreement on a final basis [Docket No. 181] (the "***Final DIP Order***").

On February 16, 2011, TerreStar Corporation and TerreStar Holdings Inc. each filed a petition for relief in this Court under chapter 11 of the Bankruptcy Code (the "***February Debtors***"). On February 23, 2011, the Court entered an order amending the Joint Administration Order to remove the Non-TSN Debtors from administration under the TerreStar Networks Inc. case number. Contemporaneously therewith, the Court entered an order providing for the joint administration of the cases of the February Debtors and the Non-TSN Debtors.

6 A detailed description of the Debtors' business and the reasons for filing these chapter 11 cases is set forth in the Declaration of Jeffrey W. Epstein, Chief Executive Officer of TerreStar Networks Inc., in Support of First Day Pleadings (the "***First Day Declaration***"), which was filed contemporaneously with the Debtors' voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

7 Because the Debtors are amending a limited number of provisions in the DIP Financing Agreement,, such as Sections 1.01 and 2.01 with regard to the definition and amount of the "Commitment", and Section 1.01, the definition of "Stated Maturity Date", the Debtors incorporate by reference herein the relief requested in the DIP Motion.

8 Ultimately, the non-Debtor entities were removed as Guarantors upon the repayment of the minimal funds loaned to such entities *See* First Amendment to the DIP Financing Agreement [Docket No. 153].

8. As noted above, the DIP Financing Agreement matures on July 19, 2011. Further, there is an Event of Default under the DIP Financing Agreement upon entry of an order approving a Sale Transaction to a party who is not a Designated Party, as that term is defined in the DIP Financing Agreement. The Debtors estimate that by the date of the hearing on this motion (should the relief requested herein be necessary), the amount of principal and interest outstanding under the DIP Financing Agreement will be approximately $74.6 million.

B. The Debtors' Sale Process

9. On April 15, 2011, the Debtors filed a motion with the Court seeking approval of bid and auction procedures for a sale of substantially all of the Debtors' assets (the "***Sale Motion***") [Docket No. 533].[9] Pursuant to the Sale Motion, the Debtors sought approval of, *inter alia*, the Debtors' proposed bid procedures (the "***Bid Procedures***"), and the setting of a hearing (the "***Sale Hearing***") for approval of any successful bidder (any such bidder, the "***Successful Bidder***") at the Auction. On May 4, 2011, the Court held a hearing to consider the Sale Motion and entered the order approving the Bid Procedures (the "***Bid Procedures Order***") [Docket No. 577]. On June 7, 2011, the Debtors filed the Notice of Revised Sale Process Dates [Docket No. 613], which Notice extended the dates associated with the sale process as set forth in the Bid Procedures Order by one week, including the bid deadline (the "***Bid Deadline***"), which was extended until June 15, 2011.

10. As further described in the Stalking Horse Motion, on June 14, 2011, the Debtors and the Purchaser executed a purchase agreement providing for a Sale Transaction to the

[9] Additional information regarding the Debtors' chapter 11 cases from the Petition Date through and including the date of filing of the Sale Motion can be found in the Sale Motion, which is incorporated by reference herein. *See Debtors' Motion Pursuant to 11 U.S.C. § 105, 363, 365, 503, and 507 and Fed. R. Bankr. P. 2002, 4001, 6004, 6006, 9008 and 9014, for Entry of (I) an Order Approving (A) Bid Procedures, (B) Notice of Sale, Auction, and Sale Hearing, (C) Assumption Procedures and Related Notices, and (II) an Order Approving the Sale of Substantially all of the Debtors' Assets* [Docket No. 533].

Purchaser (the "***Purchase Agreement***"). As such, and concurrently herewith, the Debtors filed the Stalking Horse Motion to approve entry into the Purchase Agreement, as well as a Second Notice of Revised Sale Process Dates, which further revises, among other things, the Bid Deadline to June 27, 2011, the date of the Auction to June 30, 2011 and date of the Sale Hearing to July 7, 2011.

C. The Timing of the Sale[10]

11. The transaction structure reflected in the Purchase Agreement contemplates the Purchaser funding the vast majority of the Purchase Price on the Funding Date, which will likely occur substantially in advance of FCC or Industry Canada approval.[11] However, because a number of the conditions precedent to the occurrence of the Funding Date (including, among other things, the passage of the appeal period for the Sale Order and a recognition order by the Canadian court approving the Sale, as well as Investment Canada approval of the Sale) are unlikely to be satisfied prior to the DIP Maturity Date in mid-July, the Debtors require an interim source of capital to fund operations and meet their obligations in these chapter 11 cases during the period between the DIP Maturity Date and the Funding Date. If approved, the DIP Amendment will provide the Debtors with such essential financing. Specifically, pursuant to the Eighth Amendment (which will become effective if the Stalking Horse Bidder is the Successful Bidder at the Auction), the DIP Maturity Date will be extended to September 30, 2011 and amount of the Commitment under the DIP Financing Agreement will increase to $90 million to bridge the Debtors' liquidity needs from the DIP Maturity Date to the Funding Date. To

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[10] Capitalized terms used, but not defined in this section shall have the meaning ascribed to them in the Purchase Agreement.

[11] As set forth in the Purchase Agreement, $30 million of the $1.375 billion Purchase Price will not be paid on the Funding Date, but will be payable (less the amount of the Employee Obligations (as defined in the Purchase Agreement) on the Closing Date.

effectuate this result, the Debtors seek the relief requested herein and to have this motion heard at the Sale Hearing should the Stalking Horse Bidder be the Successful Bidder at the Auction.

D. The DIP Amendment

12. Pursuant to the terms of the Final DIP Order, the Debtors are authorized to amend the DIP Financing Agreement without further order of the Court provided that the amendments are immaterial and, among other things, do not increase the commitments under the DIP Financing Agreement.[12] Because the Eighth Amendment contemplates certain changes that are material, the Debtors are seeking Court approval of the Eighth Amendment.

13. The Eighth Amendment would effectuate, among other things, the following changes to the DIP Financing Agreement:[13]

- <u>Increase of Loan Commitment</u>
    - The definition of Commitment in Section 1.01 is amended by adding the following after the last sentence thereof: "The aggregate amount of the Commitments on the Amendment Effective Date is $90 million."
- <u>Extend DIP Maturity Date</u>
    - The definition of Stated Maturity Date in Section 1.01 is amended in its entirety to read as follows: "<u>Stated Maturity Date</u>" shall mean September 30, 2011."

The Eighth Amendment will also include some mechanical changes to the DIP Financing Agreement to effectuate the material changes noted above.

14. In negotiating the Eighth Amendment and preparing this motion, the Debtors have consulted with the statutory committee of unsecured creditors (the "***Creditors' Committee***"), which supports this Amendment.

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[12] *See* Final DIP Order at ¶ 6(c)(ii).

[13] The summary of the terms of the Eighth Amendment contained herein is qualified in its entirety by reference to the Eighth Amendment, and to the extent of any conflict between this motion and the Eighth Amendment, Eighth Amendment shall govern.

Relief Requested

15. By this motion, the Debtors request entry of an order, pursuant to sections 363(b) and 364 of the Bankruptcy Code, which may ultimately not be required depending upon the outcome of the Auction, authorizing the Debtors to enter into the Eighth Amendment, which will enable the Debtors to borrow an additional $15 million under the DIP Financing Agreement to maintain operations for the period between the current DIP Maturity Date and the Funding Date and to extend the DIP Maturity Date to September 30, 2011 to the extent that the Purchaser prevails as the Successful Bidder at the Auction.

Supporting Authority

A. The Debtors' Entry into the Eighth Amendment Satisfies the Requirements of Sections 363 and 364 of the Bankruptcy Code.

16. Section 364 of the Bankruptcy Code governs a Debtors' ability to secure postpetition financing. 11 U.S.C. § 364. Pursuant to section 364(c) of the Bankruptcy Code, a court may authorize a debtor to incur debt that is (a) entitled to a superpriority administrative expense status; (b) secured by a lien on otherwise unencumbered property; or (c) secured by a junior lien on encumbered property if the debtor cannot obtain postpetition credit on an unsecured basis, on an administrative expense priority or secured solely by junior liens on the debtor's assets. *See* 11 U.S.C. § 364(c);[14] *In re Barbara K. Enters, Inc.*, No. 08-11474 (MG) 2008 WL 2439649, at *8 (Bankr. S.D.N.Y. June 16, 2008) (In order for a debtor to obtain postpetition secured credit under section 364, the debtor must prove that it was unable to

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[14] Specifically, section 364(c) of the Bankruptcy Code provides, in pertinent part, that:

> If the trustee [or debtor in possession] is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt – (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title; (2) secured by a junior lien on property of the estate that is not otherwise subject to a lien; or (3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

reasonably obtain secure credit elsewhere…); *Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp.*, 266 B.R. 575, 584 (S.D.N.Y. 2001) (superpriority administrative expenses authorized where debtor could not obtain credit as an administrative expense).

17. Courts in this jurisdiction and others have fashioned guidelines in applying these statutory requirements. Generally, courts advocate using a "holistic approach" to evaluate superpriority postpetition financing agreements, which focuses on the transaction as a whole. As one court has noted:

> Obtaining credit should be permitted not only because it is not available elsewhere, which could suggest the unsoundness of the basis for use of the funds generated by credit, but also because the credit acquired is of significant benefit to the debtor's estate and . . . the terms of the proposed loan are within the bounds of reason, irrespective of the inability of the debtor to obtain comparable credit elsewhere.

In re Aqua Assocs., 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991); *see also In re YL West 87th Holdings I LLC*, 423 B.R. 421, 442 (Bankr. S.D.N.Y. 2010).

18. In evaluating a debtors' proposed postpetition financing, courts consider whether the postpetition financing (a) is necessary to preserve the assets of the debtor's estate and is necessary, essential and appropriate for continued operation of the debtor's business, (b) is in the best interests of the debtor's creditors and estate, (c) is an exercise of a debtor's sound and reasonable business judgment, (d) was negotiated in good faith and at arms' length between the debtor and the lender (and/or its agent) and (e) contains terms that are fair, reasonable and adequate given the circumstances of the debtor and the proposed postpetition lender. *In re Farmland Indus., Inc.*, 294 B.R. 855, 862-70 (Bankr. W.D. Mo. 2003); *see also In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990).

19. Additionally, section 363(b)(1) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business,

property of the estate." 11 U.S.C. § 363(b)(1). Approval of a debtor's actions under section 363(b)(1) of the Bankruptcy Code requires the debtor to show that its decision was based on its business judgment. *See In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983) (requiring "some articulated business justification" to approve the use, sale or lease of property outside the ordinary course of business); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989) (noting that the standard for determining a section 363(b) motion is "good business reason").

20. To determine whether the business judgment test is met, "the court 'is required to examine whether a reasonable business person would make a similar decision under similar circumstances.'" *In re Dura Auto. Sys. Inc.*, No. 06-11202, 2007 Bankr. LEXIS 2764, at *272 (Bankr. D. Del. Aug. 15, 2007) (quoting *In re Exide Techs.*, Inc., 340 B.R. 222, 239 (Bankr. D. Del. 2006)). Once a debtor articulates a valid business justification, it is presumed that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company." *In re Integrated Resources, Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (*quoting Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)). The business judgment rule therefore shields a debtor's management from judicial second-guessing, and mandates that a court approve a debtor's business decision unless that decision is a product of bad faith or gross abuse of discretion. *See id.*; *see also Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986).

i. Entry into the Eighth Amendment is in the Best Interests of the Debtors' Creditors and Estates, is Necessary to Preserve the Estates' Assets and is an Exercise of the Debtors' Sound and Reasonable Business Judgment.

21. The Debtors' decision to enter into the proposed Eighth Amendment is an exercise of their sound business judgment that warrants approval by the Court. Regardless of the

outcome of the Auction, the Debtors will require funding to bridge them from entry of the Sale Order until the Funding Date. As discussed, even if the Stalking Horse Bidder is the Successful Bidder at the Auction, and the Debtors receive the vast majority of the Purchase Price on the Funding Date, the Funding Date is entirely dependent upon various conditions precedent that may not be completed until mid-August 2011 at the earliest. Accordingly, it is a likelihood that the DIP Maturity Date will pass and the funds from the current DIP Financing Agreement will be exhausted before the Funding Date.

22. The Debtors have previously established the need for DIP financing pursuant to section 364 of the Bankruptcy Code in their DIP Motion, which is incorporated by reference herein. Moreover, this Court already made the findings with respect to the factors described above in the Final DIP Order.[15] The Debtors' proposed entry into the Eighth Amendment is consistent with the Court's previous findings in the Final DIP Order because the Debtors will garner significant benefits pursuant to the terms of Eighth Amendment.

23. Most significantly, the Eighth Amendment is absolutely necessary to preserve the estates' Assets because it will provide the Debtors with the funds necessary to maintain operations in chapter 11 between the time of entry of the Sale Order and the Funding Date, and will ensure that the Debtors have the necessary funds to consummate the Sale Transaction. As discussed more fully in the First Day Declaration, the Debtors have cash needs but generate very little in the way of revenue. As of the date hereof, however, the Debtors are operating on minimal cash, almost all of which is provided by the DIP Financing Agreement. Given the Debtors' significantly constrained liquidity, impending DIP Maturity Date and the lag time before the Funding Date, entry into the Eighth Amendment will provide the Debtors sufficient

[15] *See* Final DIP Order at ¶ 5.

liquidity to fund operations and to administer the chapter 11 cases (and their foreign recognition proceedings) while the Debtors satisfy the conditions precedent to the Funding Date.

24. The Debtors recognize the potential harm to their estates should the Debtors fail to obtain bridge financing. Absent access to the funding provided for in the Eighth Amendment, the ultimate consummation of the Sale Transaction with the Purchaser will be threatened and the Debtors will be compelled to forego the benefits that would inure to their estates and their constituents from the Sale Transaction. Without the additional funds sought in this motion and provided through the Eighth Amendment, the Debtors will have no capital to support operations or fees and expenses related to these chapter 11 cases (and their foreign recognition proceedings) and would likely be compelled to liquidate, thereby threatening recoveries to their creditors.

25. Accordingly, the Debtors, with the support of the Creditors' Committee, submit that entry into the Eighth Amendment is within their sound business judgment. The Debtors have determined that amending the DIP Financing Agreement to increase the Commitment amount by $15 million will enable the Debtors to maintain operations in chapter 11 and make necessary capital expenditures prior to the Funding Date. As a result, the Debtors believe that entry into the Eighth Amendment is consistent with their fiduciary duties and will maximize value for their estates.

ii. The Terms of the Eighth Amendment are Fair, Reasonable and Appropriate Under the Circumstances

26. The Debtors believe that the terms of the Eighth Amendment are fair and reasonable in light of the Debtors' ongoing financial needs, the impending DIP Maturity Date and the current status of these chapter 11 cases. Specifically, the Debtors believe that the increase in the Commitments is reasonable in light of the fact that the Debtors will neither incur any amendment fees for such increase nor will there be any change in the interest rate or other

economic terms. Further, the increased interest borne by the Debtors as a result of the increase of the Commitment in the amount of $15 million (plus applicable interest), is negligible compared to the value received as a result of the Debtors' ability to consummate the Sale Transaction with the Purchaser.

27. Because only a limited number of provisions (as described above) are being amended, the relief sought in the DIP Motion (which has already been approved by the Final DIP Order) with respect to the remainder of the DIP Financing Agreement, is consistent with and supplements the relief sought herein.

B. The Eighth Amendment Should Be Accorded the Benefits of Section 364(e)

28. Section 364(e) of the Bankruptcy Code provides that the "reversal or appeal of an authorization . . . to obtain credit or incur debt, or of a grant . . . of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal." 11 U.S.C. § 364(e).

29. Courts generally hold that "good faith" in the context of postpetition financing means, consistent with the Uniform Commercial Code, honesty in fact in the conduct or transaction concerned. *See Unsecured Creditors' Comm. v. First Nat'l Bank & Trust Co. (In re Ellingsen MacLean Oil Co.)*, 834 F.2d 599, 605 (6th Cir. 1987) (citing U.C.C. § 1-201(19)). Additionally, good faith is measured with respect to the good faith of the lender as contrasted to that of the borrower. Transcript of Record at 736:24-25, *In re Lyondell Chem. Co.*, No. 09-10023 (Bankr. S.D.N.Y. February 27, 2009). Moreover, a lender's desire to ensure that it is repaid, to

make money on interest and fees and to protect prepetition positions are understandable and acceptable motivations for a postpetition lender in negotiating a deal. *Id*. at 737:10-14.

30. As explained in detail herein, the terms of the Eighth Amendment to the DIP Financing Agreement were negotiated in good faith and at arm's length between the Debtors, the DIP Agent and the DIP Financing Lenders, and all of the DIP obligations will be extended by the DIP Financing Lenders in good faith (as such term is used in section 364(e) of the Bankruptcy Code). No consideration is being provided to any party to, or guarantor of, obligations arising under the DIP Financing Agreement, other than as disclosed in the Eighth Amendment.

Motion Practice

31. This motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated, and a discussion of their application to this motion. Accordingly, the Debtors submit that this motion satisfies Rule 9013-1(a) of the Local Rules of Bankruptcy Procedure for the Southern District of New York.

Notice

32. The Debtors have provided notice of this motion to: (a) the Office of the United States Trustee for the Southern District of New York; (b) Otterbourg, Steindler, Houston & Rosen, P.C., as counsel to the statutory committee of unsecured creditors appointed in these chapter 11 cases; (c) Bank of New York Mellon as agent for the Debtors' postpetition debtor-in-possession financing; (d) Emmet, Marvin & Martin, LLP as counsel to the agent for the Debtors' postpetition debtor-in-possession financing; (e) U.S. Bank National Association as Collateral Agent for the Debtors' purchase money credit facility; (f) Weil, Gotshal & Manges LLP as counsel to Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P.; (g) Willkie Farr & Gallagher LLP as counsel to EchoStar Corporation in its capacity as Lender under the Debtors' purchase money credit facility and Initial Lender under

the Debtors' postpetition debtor-in-possession financing; (h) U.S. Bank National Association as Indenture Trustee for the Debtors' 15% Senior Secured Notes and Kelley Drye & Warren LLP as counsel to the Indenture Trustee; (i) Deutsche Bank National Trust Company as Indenture Trustee for the Debtors' 6.5% Senior Exchangeable Notes and Foley & Lardner LLP as counsel to the Indenture Trustee; (j) Quinn Emanuel Urquhart & Sullivan, LLP as counsel to certain holders of the Debtors' 6.5% Senior Exchangeable Notes; (k) the Internal Revenue Service; (l) the Securities and Exchange Commission; (m) the United States Attorney for the Southern District of New York; (n) the Federal Communications Commission; (o) Kirkland & Ellis LLP, as counsel to certain holders of the Debtors' 15% Senior Secured Notes; (p) K&L Gates LLP, as counsel to Sprint Nextel Corporation; (q) Industry Canada; and (r) parties in interest who have filed a notice of appearance in these cases pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors respectfully submit that no further notice is necessary.

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court (a) enter an order, substantially in the form annexed hereto as Exhibit A, authorizing the Debtors to enter into the Eighth Amendment and (b) grant such other and further relief as may be appropriate.

New York, New York
Dated: June 14, 2011

*/s/ Ira S. Dizengoff*________________________
AKIN GUMP STRAUSS HAUER & FELD LLP
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New York, New York 10036
(212) 872-1000 (Telephone)
(212) 872-1002 (Facsimile)
Ira S. Dizengoff
Arik Preis
Ashleigh L. Blaylock

Counsel to the Debtors and Debtors in Possession

<u>EXHIBIT A</u>

PROPOSED ORDER

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Ira S. Dizengoff
Arik Preis
Ashleigh L. Blaylock

Counsel to the Debtors and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
TERRESTAR NETWORKS INC., *et al.*,[1]	)	Case No. 10-15446 (SHL)
Debtors.	)	Jointly Administered

ORDER AUTHORIZING THE DEBTORS TO ENTER INTO THE EIGHTH AMENDMENT TO THEIR DEBTOR-IN-POSSESSION LOAN AGREEMENT TO (A) INCREASE THE AMOUNT OF THE COMMITMENT THEREUNDER UNTIL THE FUNDING DATE OF THE PROPOSED SALE TRANSACTION AND (B) EXTEND THE MATURITY DATE

Upon the motion (the "***Motion***") of TerreStar Networks Inc., and its affiliates in the above-captioned chapter 11 cases (collectively, the "***Debtors***") for entry of an order pursuant to sections 363 and 364 of title 11 of the United States Code (the "***Bankruptcy Code***") authorizing the Debtors to enter into the Eighth Amendment to the DIP Financing Agreement; and it appearing that the relief requested in the Motion is fair and equitable, and it appearing that the relief requested is in the best interests of the Debtors' estates, their creditors and other parties in

1 The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer-identification number, are: TerreStar Networks Inc. (3931), TerreStar License Inc. (6537), TerreStar National Services Inc. (6319), TerreStar Networks Holdings (Canada) Inc. (1337), TerreStar Networks (Canada) Inc. (8766); and 0887729 B.C. Ltd. (1345).

interest; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided, and it appearing that no other or further notice need be provided; and any objections to the Motion having been withdrawn or overruled on the merits; and after due deliberation and sufficient cause appearing therefor, it is hereby ORDERED that:

1. The Motion is granted to the extent set forth herein.

2. The Debtors are authorized to enter into the Eighth Amendment, to make, execute, and deliver all instruments and documents and to perform all acts in connection therewith that may be reasonably required or necessary for the Debtors' performance of their obligations under the Eighth Amendment.

3. Upon execution and delivery of the Eighth Amendment—which delivery shall occur upon the entry of the Sale Order—the Eighth Amendment shall constitute a valid and binding obligation of each of the parties thereto, enforceable against each party thereto in accordance with the terms thereof. No obligation or payment under the Eighth Amendment or this Order shall be stayed, restrained, voidable, avoidable or recoverable under the Bankruptcy Code or under any applicable law, or subject to any defense, reduction, setoff, recoupment or counterclaim.

4. The Eighth Amendment has been negotiated in good faith and at arms' length between the Debtors, the DIP Agent and the DIP Financing Lenders, and all of the Debtors' obligations under the Eighth Amendment will be incurred in good faith as that term is used in section 364(e) of the Bankruptcy Code.

5. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this order in accordance with the Motion.

6. The Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation of this Order.

New York, New York
Dated:_____________, 2011

____
Honorable Sean H. Lane
United States Bankruptcy Judge

EXHIBIT B

THE EIGHTH AMENDMENT

EIGHTH AMENDMENT TO DEBTOR-IN-POSSESSION CREDIT, SECURITY & GUARANTY AGREEMENT

This Eighth Amendment, dated as of June __, 2011 (this "Amendment"), to the Debtor-in-Possession Credit, Security & Guaranty Agreement, dated as of October 21, 2010, by and among**:**

(i) TerreStar Networks Inc., a Delaware corporation (the "Borrower");

(ii) Motient Holdings Inc., a Delaware corporation, Motient Communications Inc., a Delaware corporation, Motient License Inc., a Delaware corporation, Motient Services Inc., a Delaware corporation, TerreStar New York Inc., a New York corporation, MVH Holdings Inc., a Delaware corporation, Motient Ventures Holding Inc., a Delaware corporation, TerreStar National Services, Inc., a Delaware corporation, and TerreStar License Inc., a Delaware corporation;

(iii) TerreStar Networks Holdings (Canada) Inc., an Ontario corporation, TerreStar Networks (Canada) Inc., an Ontario corporation, and 0887729 B.C. LTD., a British Columbia corporation;

(iv) the Lenders from time to time party thereto (the "Lenders"); and

(v) The Bank of New York Mellon, as administrative agent and collateral agent (in such capacities, the "Administrative Agent") (as amended by the First Amendment to Debtor-in-Possession Credit, Security & Guaranty Agreement, dated as of November 12, 2010, the Second Amendment to Debtor-in-Possession Credit, Security & Guaranty Agreement, dated as of December 14, 2010, the Third Amendment and Waiver to Debtor-in-Possession Credit, Security & Guaranty Agreement, dated as of January 5, 2011, the Fourth Amendment and Waiver to Debtor-in-Possession Credit, Security & Guaranty Agreement, dated as of February 3, 2011, the Fifth Amendment and Waiver to Debtor-in-Possession Credit, Security & Guaranty Agreement, dated as of February 15, 2011, the Waiver to Debtor-in-Possession Credit, Security & Security Agreement, dated as of April 1, 2011, the Sixth Amendment and Waiver to Debtor-in-Possession Credit, Security & Guaranty Agreement, dated as of May 3, 2011, and the Seventh Amendment and Waiver to Debtor-in-Possession Credit, Security & Guaranty Agreement, dated as of June 3, 2011, the "Credit Agreement");

is entered into by and among the Loan Parties and the Lenders.

WHEREAS, Loan Parties and the Lenders are parties to the Credit Agreement;

WHEREAS, the Lender party hereto constitutes the only Lender party to the Credit Agreement;

WHEREAS, the Loan Parties have requested that the Lenders consent to modification of the Credit Agreement as set forth herein;

WHEREAS, pursuant to Section 9.08(b) of the Credit Agreement, except as set forth therein, the Credit Agreement may be amended pursuant to an agreement in writing entered into by the Borrower and the Required Lender; and

WHEREAS, in connection with such request, the Loan Parties and the Lender have agreed to amend the Credit Agreement in certain respects, subject to the terms and conditions contained herein.

NOW, THEREFORE, the Lender and the Loan Parties hereby agree as follows:

1. Definitions. Any capitalized term used herein and not defined herein shall have the meaning assigned to it in the Credit Agreement.

2. Amendments to Credit Agreement. Effective as of the Amendment Effective Date (as defined below), the Credit Agreement is hereby amended as follows:

(a) The definition of Agreed Budget in Section 1.01 is amended in its entirety to read as follows:

> "“Agreed Budget” shall mean Exhibit A to the Third Agreed Budget Letter Agreement, dated June__, 2011, by and between the Borrower and the Lender party thereto, subject to modification pursuant to Section 5.11(a)."

(b) The definition of Stated Maturity Date in Section 1.01 is amended in its entirety to read as follows:

> "“Stated Maturity Date” shall mean September 30, 2011."

(c) The definition of Commitment in Section 1.01 is amended by adding the following after the last sentence thereof:

> "The aggregate amount of the Commitments on the Eighth Amendment Effective Date is $90,000,000."

(d) Section 1.01 is amended by inserting the following definitions in proper alphabetical order:

> "”Eighth Amendment Effective Date” shall mean the “Amendment Effective Date” as defined in the Eighth Amendment to Debtor-in-Possession Credit, Security & Guaranty Agreement, dated as of June [__], 2011, among the Loan Parties and the Lender."

> "“Purchaser” shall have the meaning assigned to such term in the Purchaser Agreement."

> "“Purchase Agreement” shall mean the Purchase Agreement, dated as of June 14, 2011, by and among TerreStar Networks, Inc., TerreStar License Inc., TerrStar National Services Inc., TerreStar Networks Holdings (Canada) Inc.,

TerreStar Networks (Canada) Inc., 0887729 B.C. Ltd., and Gamma Acquisition L.L.C. and (solely with respect to Section 6.19 thereof) Dish Network Corporation."

(e) Section 7.01(cc) is amended by deleting the word "or" from after the semicolon therein.

(f) Section 7.01(dd) is amended by replacing the period therein with "; or".

(g) Section 7.01 is amended by adding the following after the last section thereof:

"(ee) the termination of the Purchase Agreement pursuant to Section 8.1 of the Purchase Agreement (other than pursuant to Section 8.1(d) of the Purchase Agreement)."

3. Consents and Other Agreements.

(a) The Required Lender hereby consents to modification of the DIP Order, in the form attached hereto as Exhibit A, and the Final Recognition Order, in a form acceptable to the Required Lender.

(b) For the avoidance of doubt, the parties hereto agree that no additional Upfront Fee will be payable with respect to the incremental Commitments effected by this Amendment.

4. Representations and Warranties. The Loan Parties hereby represent and warrant to the Lender, after giving effect to the amendments set forth herein, as follows:

(a) The representations and warranties contained herein, in the Credit Agreement and in each certificate or other writing delivered to the Lender or the Administrative Agent pursuant hereto on or prior to the date hereof are true and correct in all material respects on and as of the date hereof as though made on such date (except to the extent that such representations and warranties relate solely to an earlier date, in which case, such representations and warranties are true and correct in all material respects on and as of such earlier date).

(b) No Default or Event of Default has occurred and is continuing as of the date of this Amendment.

5. Conditions to Effectiveness. This Amendment shall become effective as of the first date (the "Amendment Effective Date") on which the Lender shall have received duly executed counterparts hereof that, when taken together, bear the authorized signatures of the Loan Parties.

6. Miscellaneous.

(a) Continued Effectiveness of the Credit Agreement. This

Amendment shall be effective only in this specific instance for the specific purposes set forth herein. Except as otherwise expressly provided herein, the Credit Agreement is, and shall continue to be, in full force and effect and is hereby ratified and confirmed in all respects and each Loan Party hereby reaffirms all obligations of such Loan Party under the Credit Agreement. Except as expressly provided herein, the execution, delivery and effectiveness of this Amendment shall not operate as an amendment or waiver of any right, power or remedy of the Lenders under the Credit Agreement, nor constitute an amendment or waiver of any provision of the Credit Agreement or any other Loan Document, nor constitute a waiver of, or consent to, any Default or Event of Default now existing or hereafter arising under the Credit Agreement or any other Loan Document, and the Lenders expressly reserve all of their rights and remedies under the Credit Agreement and the other Loan Documents, under applicable law or otherwise.

(b) Counterparts. This Amendment may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which shall be deemed to be an original, but all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of this Amendment by telefacsimile or other electronic method of transmission shall be equally as effective as delivery of an original executed counterpart of this Amendment.

(c) Headings. Section headings herein are included for convenience of reference only and shall not constitute a part of this Amendment for any other purpose.

(d) Costs and Expenses. The Borrower agrees to pay on demand all fees, costs and expenses in connection with the preparation, execution and delivery of this Amendment

(e) Reference to Credit Agreement. On and after the Amendment Effective Date, each reference in the Credit Agreement to “this Agreement”, “hereunder”, “hereof”, “herein” or words of like import referring to the Credit Agreement, and each reference in the other Loan Documents to the “Credit Agreement”, “thereunder”, “thereof” or words of like import referring to the Credit Agreement shall mean and be a reference to the Credit Agreement as amended by this Amendment.

(f) Amendment as Loan Document. The Loan Parties acknowledge and agree that this Amendment constitutes a “Loan Document” under the Credit Agreement. Accordingly, it shall be an Event of Default under the Credit Agreement (i) if any representation or warranty made by the Loan Parties under or in connection with this Amendment shall have been untrue, false or misleading in any material respect when made or (ii) subject to the applicable grace periods set forth in the Credit Agreement, if any Loan Party fails to comply with any covenant or agreement set forth herein.

(g) Governing Law. **THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK AND GOVERNED BY THE LAWS OF THE STATE OF NEW YORK AND, AS APPLICABLE, THE BANKRUPTCY CODE.**

(h) Waiver of Jury Trial. **EACH PARTY HERETO HEREBY**

WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OF THE OTHER LOAN DOCUMENTS. EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING AMENDMENT AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS, AS APPLICABLE, BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 6(h).

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed by their respective authorized officers as of the day and year first above written.

TERRESTAR NETWORKS INC.,
debtor and debtor-in-possession, as the Borrower

By:________________________________
Name:
Title:

TERRESTAR NATIONAL SERVICES, INC.
TERRESTAR LICENSE INC.,
each a debtor and debtor-in-possession, as Guarantors

By:___________________________________
Name:
Title:

0887729 B.C. LTD.,
each a debtor and debtor-in-possession, as Canadian Guarantors

By:___________________________________
Name:
Title:

TERRESTAR NETWORKS HOLDINGS
(CANADA) INC.
TERRESTAR NETWORKS (CANADA) INC.
each a debtor and debtor-in-possession, as Canadian Guarantors

By:________________________________
Name:
Title:

ECHOSTAR CORPORATION,
as Lender

By:________________________________
Name:
Title:

Exhibit A

Revised DIP Order

EXHIBIT C

In re Lyondell Chemical Co.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

	. Chapter 11
	.
IN RE:	. Case No. 09-10023 (REG)
	.
LYONDELL CHEMICAL COMPANY,	. New York, New York
	. Friday, February 27, 2009
Debtors.	. 8:35 a.m.
. . . .	. Volume 3. Pages 561-762

TRANSCRIPT OF FINAL HEARING ON MOTION
FOR POST-PETITION FINANCING
BEFORE THE HONORABLE ROBERT E. GERBER
CHIEF UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: (On the record)

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(Proceedings commence at 8:35 a.m.)

THE COURT: Good morning.

All right. Mr. Huebner, you can continue.

MR. HUEBNER: Good morning, Your Honor. I actually don't intend to be -- I'm hoping under half an hour, and a lot of it will actually be addressing the objections we have not yet gotten to. I wanted to just hit a couple of quick points on the topics we already covered, if I may.

On the maturity --

THE COURT: Sure. Go ahead.

MR. HUEBNER: On the maturity date, Your Honor, I told you yesterday evening that there was a chemical case in this courthouse in the recent weeks, and I neglected to mention its name, which I should, that had a one-year maturity; that is the Tronox case, which was cited in the papers, I believe, of Simpson Thacher, T-r-o-n-o-x. It's also Exhibit O to our brief. We did double-check it last night and, again, confirm that it is a very recent comp of a one-year maturity entered in this very building for a chemical company.

Second, Your Honor, I referred yesterday to record evidence. In fact, I think I strongly asserted the only record evidence that a one-year maturity is, in fact, currently a market term, and that is currently what the market is offering to debtors generally and not just to this one. I referred at some length to the fact that Mr. Jaffe's testimony on this

point, which is uncontroverted and, in fact, the only record evidence in this trial on what is market right now for DIPs, knocked it out of the park.

I do want to remind the Court that this is not Mr. Jaffe's first DIP or second or third or tenth. He has been doing this for eleven years at Citibank in the asset-based group and, in fact, is the expert witness at this trial on what is market for DIPs. And as I said yesterday -- I will not belabor the point -- I think it was for very, very good reason the committee decided not to call him to the stand and instead pay the price of allowing all of his declaration and designation testimony to be uncontroverted and incontrovertible.

THE COURT: Okay. And you designated the portions of his deposition that they did rely on under your Rule 32 rights?

MR. HUEBNER: We did, Your Honor. They are all in the record. I think they all speak directly to the issues at the heart of this.

What we actually did last night, Your Honor, which may not be wanted or useful, we actually made you a packet of the record evidence on the maturity dates, and if I had a long, you know, dramatic closing, I might have read lots of excerpts from it. The Court may say, I don't want that, I can go read the documents myself, or it might be useful to have a packet of the actual record evidence --

THE COURT: If you've provided it to your opponents or if you're about to do so now, I'll take it.

MR. HUEBNER: Thank you, Your Honor. We certainly will do that.

To be clear, this does not include any of the transcript testimony during the proceedings. We don't have the transcript yet. This is the evidence that is in the record from designation and declarations, and since we have the packet, I see no reason to what I might have otherwise done, which is simply read it, refer to it, you know, be dramatic about it. We all know it's in there. It was designated by them. That's the evidence and I was just going to move on.

THE COURT: Okay. Continue, please.

MR. HUEBNER: Your Honor, the next point which I want to hit, and this is my last point on maturity date, is that the only record evidence about where the DIP is trading is Mr. Dugan's testimony that it is trading below par, meaning the market doesn't think that the lenders got some great deal here. The market won't even buy this DIP right now at a hundred cents. Mr. Weisfelner argued, which was his right, that he thinks that at one point it was trading above par. He can't testify. I can't testify. I should note that e-mails I got last night said that it is now trading at 97.25, a further decline from Mr. Dugan's sworn testimony of 99.5.

So just to equal out our argument, it's now arguably

moving south but, again, the only record evidence is it is below par now and, therefore, not thought to be, obviously, all that attractive.

Okay. Moving on. On the spirit of cooperation point, Your Honor, I did reference yesterday that the committee had never asked me to have anyone meet directly with the lenders. I do want to note because I spent a lot of time with Mr. Weisfelner's partner, Mr. Levine, taking scores and scores of comments to the DIP order and I spent a lot of time thinking about how the interim compares to the final. I just want to be clear that the black line that you see is about the heaviest I have ever done in my career between an interim and a final. I say it only that Your Honor should understand that there's been a very strong spirit of cooperation. Wherever we could take their comments, large and small, we believe we did. Obviously, the things that were remaining were, in fact, unbridgeable.

THE COURT: Pause, please. When did the provision, which seemingly was some kind of black line but I couldn't tell when and how, that changed filing a complaint by the committee to filing a motion for STN authority to file such a complaint?

MR. HUEBNER: Sure, Your Honor. That's a -- it's a great example of how we work something out.

You know, we were talking about how long the deadline would be and they said we'd like standing, and we said, and the debtors said, it's not appropriate at this point to give up

standing. So we offered. We said, look, you shouldn't have to get standing before the deadline, all you need to do is file the first legitimate piece of paper. And so in lieu of a lender challenge, which obviously they would not yet have authority to do, in order to just be totally fair to them because it was a very reasonable point, we agreed that all they had to do was have an STN motion on file and those motions -- the STN requirement is that you show a prima facie case.

THE COURT: So I won't have a gun to my head to decide an STN motion.

MR. HUEBNER: No, you will not. That's a great example of the kind of, I think, very thoughtful dialogue that we had, taking whatever we could that was reasonable to narrow the issues. You will definitely not have a gun to your head. Then, you know, they have to file a motion saying under the Second Circuit law we want standing, here's why, and we're going to make it --

THE COURT: And then all of the defendants of the -- to the prospective litigation will tell me all the reasons why they don't think it's in the best interests of the estate.

MR. HUEBNER: Assuming that they have that view at the time, that's right, and there will be no gun to your head.

THE COURT: Have you ever seen a case where they haven't had that view? You saw it in Adelphia, didn't you?

MR. HUEBNER: I was just the DIP agent, Your Honor. I

definitely have seen that case, and Mr. Weisfelner has as well. There are absolutely examples where parties in interest agree that the committee is the appropriate pursuer of causes of action. Not every case is that case, but Mr. Weisfelner actually cited precedence where standing was given at the very beginning. It, obviously, wasn't contested in those cases.

So, yes. I don't think it's foregone.

But, in any event, your concern which is, am I being jammed here? Absolutely not.

THE COURT: Oh, it's not just me. It's ultimately the estate.

MR. HUEBNER: Correct.

THE COURT: Because, otherwise, that would require the creditors' committee to get its investigatory work done like in about eight seconds.

MR. HUEBNER: Yeah. I quite agree, Your Honor, which is -- again, which is why we lengthened the period and changed it to that. They just need to file an STN motion with an appropriate -- with a complaint and the deadline to satisfy.

Now, in the real world I would venture to say, since we've all been down this road before, that's probably not what's going to happen because in the real world when the committee calls someone and says, okay, it's Day 134 and tomorrow's the deadline, would you like me to file a two-hundred-and-sixty count really nasty complaint, or would you

like to give me an extension so that we can have some more time to try to work this out. The answer in, I think, every case I have ever been in is that the parties agree to something reasonable. I don't -- I've never -- I don't think I've ever been involved in a case where someone said, file your complaint, because if there's a hope of working things out, you extend and you do.

So I don't -- I can't -- I'm not going to profess where this will be a problem in the future, but I can say that the mechanic was changed very substantially in a way that greatly lightens their burden and puts no time deadline on the Court at all.

Speaking of burden on the Court, Your Honor, we actually fought very late last night about Your Honor's comments in terms of the Court being jammed on the milestones and, actually, we quickly drafted, circulated it to all the lenders and gave them a scream-or-die deadline, which has now past, revised language that I hope addresses or, at a minimum, ameliorates substantially the judge's concern.

What we changed, as Your Honor remembers, there was flat language, including what I had not seen before, I thought it was a little bit unclear, about the confirmation hearing having been held. I didn't know, as you didn't know, does that mean ended, began. I don't know what it meant. So we rewrote it as follows, which I hope will be something the Court finds

pleasing. This is Section 618(c) and (d), which have both been changed as follows: "C: By October" -- oh, I think we forgot to tell the debtor. We loosened the milestones.

"C: By October 15th, 2009, obtain approval by the Bankruptcy Court of such disclosure statement related to such reorganization plan provided that if the debtors have commenced a hearing prior to October 15th, 2009, with a reasonable belief that such approval could be obtained at such hearing by such date, and due to the Bankruptcy Court's availability such hearing has not concluded by October 15th, 2009, then such deadline shall be deemed extended by up to ten days to accommodate the Bankruptcy Court's availability."

THE COURT: Ten days?

MR. HUEBNER: Again, Your Honor, they should be filing early enough to be done by October 15th. The goal is not to take away the deadline. You know, if they're responsible they'll work with chambers, they'll get the time they need and the hearing will start whatever number of days before that is necessary. But if we're moving along and the Court is not available for continuations like the one that the Court has made itself available now, there is another ten days, and then, frankly, on top of the ten days is the fact that, as we discussed yesterday, the Courts have an amazing ability to

request extensions from the parties.

And, again, this is within the debtors' control. As long as --

THE COURT: Pause, please. Now that was on the disclosure statement?

MR. HUEBNER: It's there for the plan as well, Your Honor. In D:

"By December 1, 2009, obtain confirmation by the Bankruptcy Court of such reorganization plan, provided that if the debtors have commenced a hearing prior to December 1, 2009, with a reasonable belief that such confirmation could be obtained at such hearing by such date, and due to the Court's unavailability the hearing has not concluded by December 1, then such deadline shall be deemed extended by up to ten days to accommodate the Bankruptcy Court's availability."

So, again, their goal and obligation is to be done by those dates and they need to start in time with a belief that they can be done. That's what a deadline is. But if the situation like the one we faced between Wednesday and today comes up, that we just need more hearing, there is a pre-agreed ten-day extension and then, obviously, we can face then what happens. But the only other way to do it is just to say, there's just sort of -- there's no real deadline, and that's not really fair either. So at a minimum we now know what --

when they're supposed to be done by and what they're supposed to have done, and there's at a minimum a ten-day additional period to get that done as necessary.

Your Honor, I owe you a second apology because I was stunned to hear --

THE COURT: Pause, please, Mr. Huebner. Have you circulated the proposed revised language of 618(c) and (d) to the other parties?

MR. HUEBNER: Your Honor, that's a fair question. We have not because, again, we sent it to the lenders in the middle of the night saying, you have until 8 a.m. and if you don't reply, we will deem you to have consented. It is a pro-debtor, pro-committee change. We have copies with us. And you're right; once the 8 a.m. hour passed a few minutes ago, we probably should have blasted it out. But we do have copies available and we can hand them out to people.

THE COURT: Including me.

MR. HUEBNER: Yes, Your Honor. For you, I -- you can have my copy.

I don't want to pretend this is a seismic change. It's not. It's not a seismic change, but it is one that was intended to address the concern, A, that I think (d) was just badly drafted since we couldn't tell whether events commenced or ended, and then the issue of some additional leeway being put in to accommodate possible scheduling issues.

THE COURT: Mr. Huebner, the way I read this, this gives me ten days to issue a confirmation decision on a potentially contested confirmation hearing.

MR. HUEBNER: Your Honor, that's not -- it's not unusual for all sorts of documents to have deadlines that the plan shall have been confirmed by date X. That's in almost every bankruptcy case. There is some document, whether it's a purchaser that says the sale order shall have been entered by date X, or a purchaser who says the bidding procedures order shall have been entered by date X, or the union that says, my claim shall have been found unallowable by date X. This is just the end date. The debtors need to start whatever number of days in advance of that is necessary to give you the time to issue your decision. So if they need to start the hearing, you know, six days, eight days, four days earlier, there's nothing remotely path-breaking or unusual about this.

In every bankruptcy case, debtors sign documents all the time that require a court order by a certain date: The assumption of a contract, the approval of an M&A transaction, the approval of 363 non-ordered course transaction. This is just the work-a-day aspects of being in Chapter 11.

So other than saying that there are no milestones which, I think, is, you know, not -- well, (A), It's not something I think the lenders would agree to, but (B), it's just not something that I think is found in many or most deals.

I mean, anytime a DIP has a maturity date, that means it has to be repaid by that date. They all have maturity dates. That means that the plan shall have gone effective by such date and it not only requires that a confirmation order be entered by a certain date, but that all conditions precedent to a plan to allow it to go effective, to allow the refinancing under the exit facility also be done. I mean, that's what deadlines are.

THE COURT: Go on, if that's all you have to say about that.

MR. HUEBNER: Your Honor, the second apology that I think I owe you was your reference to the Applied Theory case, which I just can't believe that we didn't cite. You obviously have ruled on the very topic that we talked about in a manner favorable to the lenders and nobody cited it to you. I don't think I need to read you the ruling. I'm sure that you're well aware of it.

THE COURT: I generally remember what I say.

MR. HUEBNER: Yeah. So I don't need to say more other than to give you the companion comfort. You asked me yesterday whether I was confident that this was a fair DIP order on this point, that it provided the pre-petition lenders with adequate protection only for diminution and didn't, for example, say things like, you won't get interest, and also that the lender challenge and the unwind rights both with respect to the pre-

petition loans and the roll-up, would give you the authority to unwind, reverse, you know, anything that turned out to be inappropriate in light of any challenges that any party might bring, and I just want to reaffirm my answer.

I was comfortable at the podium when you asked that impromptu at the interim hearing. I was comfortable at the podium, again, when you asked it impromptu yesterday, but I know it's not impromptu when the Court has concerns. We went back through the order. We checked all the provisions and we're very comfortable that the rights of the parties and the Court are preserved, including with respect to the diminution issues that we discussed yesterday in terms of avoidance actions, which is if they lose a lien, either because it was a fraudulent transfer or because it was unperfected as to an entity, they can't get it back some wrong way and it is taken away from them and there are provisions in the order that make it very clear that that's what happens.

Your Honor, in terms of -- that's, I think, all I'm going to say about the creditors' committee. I obviously spent some time yesterday on their objections. I think it would be fair and interesting to no one if I revisited any of that ground.

In terms of Bank of New York, Your Honor, I think I'm going to leave that largely to Mr. Ellenberg. I obviously said, I think, a fair piece on that as well, except --

THE COURT: Which portion are you going to leave to Mr. Ellenberg?

MR. HUEBNER: The Bank of New York objection about their adequate protection, except to note really only one point on it, which is as follows:

You know, the creditors' committee believes that as a matter of law and fairness, Bank of New York's adequate protection lien should only come from the entities on which they currently have a claim, which would be radically more limited than the package that the debtors have offered and the lenders have agreed to.

Bank of New York's view is that they get, obviously, tons and tons of stuff and I won't repeat any of that.

The middle view or, in my view, the radically more favorable to Bank of New York than the midpoint view is obviously what was done.

I want to note that in terms of the marshaling issue, which I really do feel is not a real issue, number one, the intercompany post-petition liens are not only super priority and secured, they are senior to adequate protection claims and that's very important because it means that money comes back to the debtors who lent it before any adequate protection is given or paid, which is a big level or unfairness point that, frankly, I think is the right point.

THE COURT: Your point being that reduces the

diminution of value of --

MR. HUEBNER: Of their entity.

THE COURT: -- Mr. Siegel's debtor's concerns because they haven't been tapped as much because they can recover it from their sister companies before their total asset pooled to meet their claims is computed.

MR. HUEBNER: That's correct, Your Honor, although to be clear, I actually think they may be a net taker and not a net giver, but that's what I'm going to leave to Mr. Ellenberg. I'm not --

THE COURT: Well, if --

MR. HUEBNER: -- the debtor.

THE COURT: -- if there's a net taker, then you're saying there's no harm, no foul.

MR. HUEBNER: That's exactly the point; that there is an evening mechanism before adequate protection is paid so that it ensures fairness. So if their entity is a net giver, they get it back. If they're a net taker, they don't get to unfairly take it from others.

But the second point is even more important, which is it doesn't matter at all and that's why it's a fake issue because the ultimate marshaling right is a Federal Court order that says, you can look to every single entity in the corporate family and take value wherever it's found, senior to every single unsecured creditor in this case, senior to every

administrative creditor but for the DIP under 507, which has a statutory requirement that adequate protection claims be paid on an administrative priority basis.

So, again, I won't repeat yesterday's argument but just to say the line that, you know, that sort of struck me, whether it was sort of funny or not, that they have gone from having a teenie weenie four-percent pro rata lien, pro rata unequal and rateable with the -- credit facility against only one entity that could fair very poorly indeed who knows it's having an adequate protection right to refill every dollar of diminution and loss from the entire corporate family, including ABL collateral, which they never had before, and even their own expert, I think, uses $16.8 billion or some number like that, and I think that's Paragraph 9, maybe, of his declaration, you know, saying even with these -- you know, knocking down the assumptions, there's only, you know, at most 8 billion of DIP and so there's billions and billions that turn to pay the adequate protection claims that they now have a right to, which right now they don't have a right to.

Also, Mr. Bigman testified under oath, because I asked him because it was important to me, do these entities need the DIP loan; yes. Is it in their best interest, just the entities Mr. Siegel is talking about, is it in their best interest; yes. So the only evidence, the only testimony we have -- and I know Mr. Ellenberg will address numbers -- is that these entities

have to have this DIP and that they're benefitting from this DIP.

In terms of Millennium, Your Honor, I'm very glad we had overnight to deal with this one because we found some stuff in the indenture that I think you're going to find kind of interesting.

Number one, let's talk about the law. The law is that a negative pledge, right, is not respected and not enforceable in bankruptcy.

THE COURT: That being Allegheny.

MR. HUEBNER: Well, it turns out it's not only Allegheny, Your Honor. It's also the Southern District from this district in the form of Judge Duffy's opinion, which we found very early this morning in McLean Industries. The cite is 162 B.R. 410. There was no mention --

THE COURT: And that's Kevin Duffy in --

MR. HUEBNER: It is, Your Honor.

THE COURT: -- McLean?

MR. HUEBNER: Yeah. All we did was Shepardize Allegheny. I don't want people to think we went and did some magic research project. We just hit Shepardization and we got four cases and the other three --

THE COURT: Okay. I would have hoped --

MR. HUEBNER: -- weren't relevant.

THE COURT: -- your associates Shepardized Allegheny

before last night.

MR. HUEBNER: It was not in our brief, Your Honor. It wasn't our issue. It was in the debtors' brief, but we're careful, so we Shepardized it. So --

THE COURT: Where was the Allegheny response?

MR. HUEBNER: In the debtors' response, Your Honor. Remember, we're just the lenders.

THE COURT: Yeah. I understand that. Okay. Go on.

MR. HUEBNER: So this case, which was reversed on wholly unrelated grounds so I don't think that's analytically relevant, says as follows:

"MARAD argues that the assignment was simply an enforcement of security interests... In fact, MARAD had only a restrictive covenant requiring its consent prior to USL's bareboat chartering of the vessels. A restrictive covenant is not a perfected security interest or a property interest that is valid against a debtor-in-possession or a trustee under the Bankruptcy Code. See Allegaert v Chemical Bank, 657 F.2d 495 (2d Cir.1980); Allegheny, 93 B.R. 907 (Bankr. W.D. Penn. 1988)."

So I think the law -- I mean, you know, let's not get too dramatic. There are only a couple of cases but the cases say the same thing and they're clearly right, which is that a restrictive covenant is just totally unenforceable in Chapter

11. It would obviously be a crazy outcome, as a matter of policy, if you could prime someone that had an actual perfected lien. But if someone had nothing but a, you know, a whispery promise not to put more debt on, that that somehow was stronger than an actual lien.

But then there are the facts, Your Honor, which sort of matter, too.

Mr. Rosenbloom, who, by the way, I thought did a really excellent job, did lead you to believe that there was a provision in the existing debt documents that incorporated the restrictive covenant on secured debt. That is not true. In fact, what Section 11.13 of the senior facility and the analogous provision of the other facility tell you are that there's --

THE COURT: Pause. This is of the pre-petition senior facility?

MR. HUEBNER: It is, Your Honor. Let me just read it for the avoidance of doubt.

"Any amount that may be guaranteed by Millennium Chemicals, Inc., or any of its subsidiaries shall not exceed the amount permitted to be incurred as defined in the Millennium Indenture as 'funded debt'" -- that's a defined term. We'll talk about that in a minute, very important -- "as defined in the Millennium Indenture as more fully set forth in

Section 10.09 of the Millennium Indenture provided, however, that upon the refinancing in full of the Millennium notes, this Section 1113 shall cease to operate and have any force" -- I would have said no force -- "and have any force and effect as of the date of such refinancing."

So does it actually incorporate the restrictive covenant? No. That's a totally different section of the Millennium indenture that relates to the inability to put on secured debt.

What it actually tries to incorporate --

THE COURT: You want to slow down, please, Mr. Huebner?

MR. HUEBNER: I apologize, Your Honor.

There are two arguably relevant sections of the indenture. There is the restriction on other secured debt, which is what he talked to you about at some length yesterday, and then there's a cap on the amount of debt.

THE COURT: Now you're talking about the latter?

MR. HUEBNER: Well, that's what the documents are talking about and we'll be more precise yet in a moment.

So to be clear, nowhere in the senior facility is there any agreement, acknowledgment or incorporation of the fact that the Millennium indenture says we get equal and rateable treatment. It's just not there. Period. So this

whole argument that we have protection against secured debt that the lenders agree to is not true.

Then the question is -- and it's not actually relevant but I'll answer it -- did we agree that there would be a debt cap, and the answer is, no, and here's why:

Remember when I read it I said it talks about funded debt and that it's very important to read definitions. What's the definition in the Millennium indenture of "funded debt"? I'll read that one, too.

"Funded debt means debt that by its terms matures more than one year from the date of original issuance or creation; or, (2) matures within one year but is renewable or extendable at the option of the obligor to a date more than one year from such date."

So to be clear, it certainly wasn't our intention, just an odd coincidence, that because the DIP loan is more than -- is less than one year in length and does not have an extender feature, even if -- and we'll deal with the "even if" in a moment -- even if somehow the DIP lenders, because they were senior facility lenders, are somehow bound for the rest of their natural lives by this pre-petition indenture, it doesn't matter because funded debt is debt that's more than one year and the DIP is not. So it's not covered. It's not incorporated. But it is --

THE COURT: Is this a provision that I have to take

into account if I make your guys promise to provide a one-year facility calendrically correct?

MR. HUEBNER: It's not, Your Honor, because -- and that's the last point. In other words, first there's the law that it's totally unenforceable; then there's the facts, that the documents actually don't do what he says they do; then there's the reality, which is what he's basically saying is, and I'll just use Citibank as an example, because Citibank is a senior facility lender and because in the senior facility there's a provision that says and clearly means -- it clearly means this -- that the senior facility will not be enlarged in a way that violates the debt cap. What he's really saying is unthinkably radical; that Citibank can't be in the DIP because it promised for itself as an institution never to allow this bad thing to happen. That's nonsense. Citibank agreed under, if anything, under the senior facility that this facility would not be expanded.

I mean, think about what he's saying. He's saying that if it's all new money lenders, we can do a DIP of any size. But if he catches one person who was in the senior facility, he can get them thrown out of the DIP because they promised that they would never buy into any facility. That's not what it means. When documents agree to something, you're agreeing in your capacity as a lender under that document. You're not binding your institution for the rest of time.

There's a reason here, too, he has no case law because it's an unthinkable proposition; that when you sign a document agreeing to something, with respect to that document, you're binding your institution for the rest of the known universe. It just -- it doesn't -- so the answer is you don't need to resolve it for all those reasons.

And let me give you a fourth one. There's another misstatement of law in his papers, which is a little bit surprising because we know this -- we all know this provision very well.

He says that 365(c)(2) says -- means -- says that a debtor -- he says -- let me be more precise.

"Under 365(c)(2), a debtor cannot assume, assign or reject the Millennium indenture because..."

Well, the only problem is 365(c)(2) is missing the third word: "reject." And that's exactly the point. We all know what it says. We've been dealing with it for decades. 365(c)(2) prevents the assumption or assignment of a financial accommodation contract. It certainly doesn't prevent its rejection. In fact, basically, financial contracts are deemed accelerated and are rejected.

So to say -- and this is why Allegheny and McLean are, of course, right -- lenders can't enforce covenants in accelerated debt documents once a filing happens. 365(c)(2) is there to stop the lending of new money or the issuance of new

securities, but it doesn't say you can't reject it. In fact, the indenture basically is rejected and now it has a claim equal to the face amount of the notes as of the filing date of the case. So if he wants to have a breach claim, it's great, but it's a mathematical totality --

THE COURT: Well, is another way of saying it, is it tantamount to getting specific performance of an agreement that is going forward after the --

MR. HUEBNER: That's a great way to say it. He wants specific performance of an unassumable pre-petition financing contract. Well, so would every lender. I want all my covenants respected, I want my minimum cash flow tests, I'm -- for performance, I want all my -- I mean, no. You have a claim, file it, we'll see you in the claims process. To do anything else would be a radical departure from law, which is why, of course, he has no cases, 0.0, and we have the only cases, which are McLean, which is a District Court case from this jurisdiction, and Allegheny. And they couldn't be more -- they're so obviously correct it's just not even worth spending more time on.

Of course you can't enforce a provision in a pre-petition contract of this nature. You can't even assume the contract if you wanted to. If you wanted to assume it and you wanted to accept its burdens with its benefits, you can't do it. Here the debtors certainly have not, and I'm sure Mr.

Ellenberg would be very happy to rise and make an oral motion to reject the Millennium indenture to make this clear beyond any further debate.

Your Honor, that's, I think, all I'm going to say on Millennium.

Your Honor, the last issue is the sales tax that I'm going to hit for right now because I do want to cede the podium and because I know we're dealing with ABN AMRO later, and so while I think that there are certain provisions of the term sheet that you're going to find very, very, very interesting and will help you very quickly resolve ABN AMRO, we're not going to do that yet. Instead, we're going to talk about the tax objection.

Your Honor, as you know -- Mr. Sonik, are you on the phone?

MR. SONIK: Yes, I am.

MR. HUEBNER: Fabulous. Thank you.

Mr. Sonik very courteously reached out to us, Your Honor, as you suggested and told us that he would not be relying on any new cases. We looked at his paper and Shepardized that and are just going to cite one Supreme Court case, which we sent him the cite and the actual copy of so he wouldn't have to try to find it in the middle of the night as soon as we found it. It's Butner v. United States. It's very famous.

THE COURT: Butner?

MR. HUEBNER: Butner. I'm sorry, Your Honor.

THE COURT: I know Butner.

MR. HUEBNER: And will say nothing surprising. But, you know, the interesting thing -- and I want to affirmatively give credit where credit is due. Darren Klein, second-year associate Davis Polk, brought to my attention a provision in the Bankruptcy Code that just went in that I have never seen before. It is totally dispositive and puts this right to bed. Let's go to the videotape.

Section 503(b) talks about what is a priority claim. 503(b)(1):

"Any tax incurred by the estate" -- and now we're
going to begin the bracket --

THE COURT: Wait. 503(b) talking about priority claims?

MR. HUEBNER: Yeah.

THE COURT: I thought 503(b) talks about administrative expense.

MR. HUEBNER: It does. Well, that's a priority. I mean --

THE COURT: Oh, okay.

MR. HUEBNER: -- it's sort of an administrative priority. So:

"Any tax" --

THE COURT: In which subsection?

MR. HUEBNER: -- "incurred by the estate" -- and now you put a little bracket around the word "whether" because this is what's brand new:

"[whether] secured or unsecured, including property taxes for which liability is in rem, in personam, or both."

Right? So first you have 503(b)(1) that says secured property taxes are admin priority claims under this section of the Code even if secured. And then, of course, you go back to 364, and what does 364 say? 364(c)(1) says that the Court is authorized to grant administrative priority status that is senior to, quote, "any and all administrative expenses of the kind specified in Section 503(b) or 507(b) of this Title."

So before we even talk about the lien, which we'll do in a minute, Congress was not only very clear, but spoke very recently:

"364 DIP priorities are senior to the status that we hereby confirm and give to secured property tax claims under 503(b)."

It's just clear on its face and it's the law of the land.

But now let's pretend for a minute that this new section is not in the Code and that we're dealing with the more generic question of the fact that 364(d) on its face clearly

says that, where necessary and appropriate, the Court is authorized to grant a lien that is senior to all other liens. So we just have a classic supremacy clause problem. So we're just back to law school.

The federal statute says the DIP lien is senior to all other liens and they have a state tax statute that gives them state priority for their tax liens. Well, we know who wins, (a) because we all went to law school, and (b) because there's actually a Supreme Court case that is directly on point, and that case, which I embarrassingly mispronounced, is Butner.

In the Footnote 9 of Butner, the Court says the following:

> "The Federal Constitution, Article I, Section 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress, it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress enacted under its constitutional authority on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress."

Now there was clearly a conflict before 2005 because 364(d) said, we win, and state law said they win. But in case

anybody was concerned that the Congress -- that the conflict wasn't sharp enough or crystalized enough, 503(b) just smacks you in the face with it because it says for the first time secured property tax claims are deemed 503(b)(1) claims, and then 364 says DIPs beat secured property tax claims.

So as you know, again, here, too, we were flexible. We're not priming anybody that preexisted us to the extent that there are property taxes that were properly perfected --

THE COURT: Well, okay. Pause. I haven't checked the legislative history. I think this was one of the BAPCPA amendments?

MR. HUEBNER: It was, Your Honor.

THE COURT: Presumably by reason of the lobbying of the state tax authorities to get what they perceived to be more protection, and this is just one of those cases where Congress, if we're going to follow the plain meaning Congress attaches -- or the Supreme Courts told us we have to follow, we follow it whichever way it cuts?

MR. HUEBNER: Your Honor, I don't know why it was put in. We could only do so much overnight with no prior notice. But whether or not they wanted it to get certain benefits --

THE COURT: Your point is it's there now and the --

MR. HUEBNER: -- it's there now.

THE COURT: -- language is unequivocal.

MR. HUEBNER: And it came with certain consequences,

including 364(c), without any question coming on top of it. I guess maybe it will end up in the category of be careful what you wish for.

THE COURT: I think that may well be the case. All right. Mr. Huebner, I wonder if it's desirable to pause now for you to give Mr. Sonik to be heard on this issue here when you finish the points relating to him.

MR. HUEBNER: Your Honor, I think that I am finished with the points relating to him.

THE COURT: All right. Mr. Sonik, do you want to respond?

MR. SONIK: Yes, Your Honor, very briefly.

I have not had a chance to try to digest the 503(b) argument that he was raising, but we simply urge the Court not to find or construe 364(d) as the operative provision that we were looking at to subordinate the post-petition interests of the State of Texas that would otherwise be superior to the DIP facility under a state law.

THE COURT: Okay. Pause, please. If I heard Mr. Huebner right, he's relying not just on 364(d) but also 364(c)(1).

MR. SONIK: 354?

THE COURT: 364, which is, of course, the financing provision, (c) which talks about obtaining credit with priority over certain things, and (1) which lists admin expenses in that

category.

MR. SONIK: So 364(c), subparagraph --

THE COURT: One. Did I hear you right, Mr. Huebner?

MR. HUEBNER: Yes, Your Honor. I believe that's correct.

MR. SONIK: And the argument is that 503 --

THE COURT: (b) lists exactly your kind of tax lien.

(Pause in proceedings.)

THE COURT: Mr. Sonik, I know you have to go through this but we've had a -- several moments of silence.

MR. SONIK: Yes. I'm trying to digest it as quickly as I can, Your Honor.

THE COURT: Mr. Huebner, do you object if you go on to your other points and I let Mr. Sonik speak to this when you're done with your other points?

MR. HUEBNER: Your Honor, I only have one problem with that. I am done with my other points.

THE COURT: Oh, all right. Are you planning on leaving the courtroom at this point or staying around for a few minutes?

MR. HUEBNER: No, Your Honor. I will be here at least until 11:30 at which point something is -- that is not moveable will come up. But I'll certainly be here for a little longer.

THE COURT: All right. Mr. Sonik, I'm going to give you a few more minutes to do this, but I'm going to ask Mr.

Huebner to sit down now and we're going to move on.

MR. SONIK: Thank you, Your Honor.

THE COURT: Okay.

MR. SIEGEL: Your Honor, may I have a moment?

THE COURT: It depends on what it's for, Mr. Siegel.

MR. SIEGEL: Okay. It's actually very straight forward and short. I had not thought when I gave my oral argument that I might ask the Court to speak again. I do not know what Mr. Ellenberg will say, but I want to alert the Court to the fact that after Mr. Huebner's presentation, that I may, in fact, ask the Court to speak again and let you know that.

THE COURT: I'll decide that when the request needs to be made and I need to rule on it.

MR. HUEBNER: Yeah. And to be clear, Your Honor, the -- then, I mean, I guess if we're going to go to an endless series of closings and re-closings, we'll ask for the same reservation, which I would hope would not be granted.

THE COURT: Okay. Who's next?

Ms. Martin, are you planning to be heard or are we going straight to Mr. Ellenberg or what?

MS. MARTIN: Your Honor, I would like to be heard, but I don't feel the need to repeat all of the very persuasive arguments that Mr. Huebner has made on points that really overlap what the ABL -- and even address the term facility as well.

So I do have some very brief points I would make on maturity and the BNY point. I wonder, though, if it doesn't make more sense for me to wait until after ABN speaks. I can make those very brief clean-up points and lay arguments with respect to ABN.

THE COURT: All right. Mr. Ellenberg, I'll hear from you next unless you want to yield to Mr. Goffman.

MR. ELLENBERG: I would yield to Mr. Goffman, Your Honor, and I'll bat clean-up.

THE COURT: Okay.

MR. GOFFMAN: Thank you, Your Honor.

Again, Jay Goffman from Skadden Arps on behalf of Access. For the record, Access is the owner of this business with billions of dollars invested in this company.

Your Honor, for the past two days we've all sat in this courtroom and we've heard Mr. Weisfelner and his partner make all types of false and unsubstantiated attacks against my client.

Now, I knew that eventually we were going to get to that in this case. He had campaigned when he sought to be retained by the creditors' committee on the premise that he would attack Access at some point. But what I couldn't figure out was why today? Why make these types of false and irrelevant attacks in the context of a DIP financing hearing?

But Mr. Weisfelner, in his very eloquent closing

argument, made all that clear. He said a few things. He said he wants to extend maturity of the DIP financing, he wants fewer milestones, fewer covenants, less control over management. We support those goals. As the owner of this business, we would prefer to have the best DIP financing this company could possibly get. Longer maturity is great. Fewer milestones is great. What we don't support, however, are the tactics that he used to try to get there.

As Mr. Weisfelner pointed out to the Court, in the Norma case (phonetic), the standard for determining whether or not to approve a DIP financing is the business judgment of the debtor. He pointed out to the Court that you could get to a strict scrutiny standard, however, if it was deemed that the actions of the management were somehow tainted by being affiliated with the acts of a supposed bad guy insider.

So that was the strategy. He wanted to spend two days trying to tie the management of this company to Access and trying to paint the management as the shield for Access and trying to paint Access as a bad guy. And that's what we heard over and over and over again.

Unfortunately, the facts and the evidence prove quite the contrary. They try to discredit Mr. Bigman, the company's CFO. They tried to say he was somehow working for Access. Well, the evidence shows he's not. The evidence shows he's always been working for -- that he's been working for the

company. The evidence shows that he's satisfied his fiduciary duties; that he's argued long and hard for the company in trying to get the best facility this company can get. He's argued for all the key points that were necessary and he took no act -- he took no action on behalf of Access and he wasn't affiliated with Access at all in the process.

Nor was there a shred of evidence that Access has done anything improper. We heard again and again that, somehow, Access was tied up in the DIP facility from Mr. Weisfelner. Well, the evidence shows exactly the opposite. The evidence showed Access is not participating in the DIP facility, has agreed not to participate in the DIP facility, and will not buy into the DIP facility. The evidence has shown that Access wasn't the party that picked the maturity date here. The DIP lenders got together and decided on the maturity date. If we could get a longer maturity date, we'd be all in favor of it. It wasn't our call.

The evidence shows that we have -- Access has no involvement whatsoever in the extension of the maturity date under the DIP, and has no involvement whatsoever in the milestones or the covenants.

In his closing argument he stood here and said he was confused about the role Access plays in the DIP. Well, he's a smart guy. He wasn't confused. He just didn't like the facts.

What he failed to note to the Court, however, Your

Honor, were the things that Access has already done to make sure that we could avoid these types of sideshows. The supervisory board of this company created a restructuring committee. That restructuring committee has five members, three of whom are independent directors. The chairperson of the restructuring committee is an independent director, Mr. Flaugh (phonetic). It was the restructuring committee and Mr. Flaugh that led all the negotiations on the DIP financing, not Access.

He also forgot to note that, again, to avoid these types of sideshows, Access has already agreed that whatever debt we buy in this case, we're not going to vote that debt under a plan. We're going to let the other parties in this case figure -- vote on a plan so -- because we want to avoid these types of sideshows.

He also said that we were in court here because we were somehow afraid of actions that they might bring against us. That's nonsense, Judge. We're in this court because we're the owner of this company. We've invested billions and billions of dollars in this business and we'd like to see this company come out of Chapter 11 in an organized manner. We want every creditor in this case to be paid, secured and unsecured. It's only then that we can start realizing on the equity that we have invested in this business, and true -- and there is lots of equity. As Mr. Weisfelner himself pointed out, less

than ten months ago this company was valued at over $30 billion. That's over $10 billion of equity that was here less than ten months ago. The only reason we're in court now is the catastrophic worldwide events that have occurred to all these types of companies.

Now, going just to the -- to his goals, again, a longer the maturity, here, here. We would love that; fewer covenants, the fewer the better; fewer milestones, yes; less control by lenders over management, terrific. If he can get it -- if Your Honor wanted to insist upon it, we would have no objection. But the standard is the business judgment of the debtor. We accede to the debtors' business judgment that they need the money and they need the money now, and they spent a lot of time negotiating for this DIP financing and they need it approved today.

So we would urge that Your Honor approve the DIP financing with whatever additions Your Honor thought was appropriate today so that this company can proceed; so that the businesses worldwide don't have to worry about the stories about whether or not there's going to be appropriate financing; and so that we can eventually get on to the real task of reorganizing these businesses and trying to get value to the parties.

THE COURT: All right.

MR. GOFFMAN: Thank you.

THE COURT: Thank you. Mr. Ellenberg.

MR. ELLENBERG: If the Court please, Mark Ellenberg, Cadwalader, Wickersham & Taft, on behalf of the debtors.

Your Honor, the fact that we're standing here today requesting approval of this debtor-in-possession financing facility is really nothing short of a miracle. We have seen a lot of focus in -- during this hearing on small parts of the package that make up this DIP financing facility, and we need to focus on those small pieces, and I will focus on them later on, but we also need to step back and assess those pieces in the context of the overall facility that's being presented to the Court, what it is, and what it means.

Because what we did here, Your Honor, was throw some banks -- investment banks and hedge funds into a conference room a week before Christmas and tell them that we needed $5 billion in new money, including term loans and continuing access to asset-backed liquidity, and we told them that it all had to be done by New Year's, and that no one was leaving until we were finished, and to come out of that situation with this facility is simply nothing short of amazing.

And I will just read for a moment from Mr. Jaffe's testimony. It's Page -- it's Paragraph 13 of his declaration. He's actually quoting himself from his deposition and he says:

"I'll say again, they needed to raise over $3 billion between Christmas and New Year's. This was a

Herculean effort and, you know, we were -- I'll tell you, I was concerned that the company wasn't going to get it and we were going to have to liquidate our collateral. So I think the fact that it got done is tremendous."

And it's just indisputable, Your Honor, and it's easy to take for granted that we're here and we have access to $8 billion. But it wasn't looking so easy the day before Christmas and, in fact, it wasn't looking so easy on January 3rd, when we were still sitting at midnight in a conference room counting pennies and wondering whether we were going to get there. This is an amazing accomplishment.

And moreover, Your Honor, the choice the debtor had was take this DIP or liquidate -- or get this DIP and liquidate because without this DIP financing there would be no reorganization. There would be no reorganization in the U.S. There would be no value in Europe. We would have liquidations all over the place.

To be sure, this DIP has its warts. Some are small; some are big. But warts and all, the question that this debtor had to answer and had to exercise its business judgment on was, is this DIP better than a liquidation. The answer is clearly yes. In fact, when committee counsel rose to speak yesterday, one of the first things he said was, yes, this DIP is better than a liquidation, we do want this DIP approved. And he also

said -- the very first thing he said was that there really is no alternative to this DIP.

And that, Your Honor, is simply the case. This is what we got. We did the best we could. Nobody will stand up here and say it's perfect. The debtor won't say it's perfect. The lenders won't say it's perfect. But we did it and it's a huge accomplishment and it gives the debtor a chance to live and to breath and to reorganize, and really at the end of the day, that was all we could ask. We did the best we could. We all did the best we could.

Now, there are some other very important features about this facility, Your Honor, that have been lost a bit in the focus on some small points. One of them is that this facility permits us to fund not only the United States but Europe where one-third of the total enterprise value resides, and that we're doing this outside the purview of Chapter 11.

I think, Your Honor, that's unprecedented. We've already talked about how this is the largest DIP in history. I think this aspect of the DIP is unprecedented as well. It was very tricky. It was very controversial. It assumed a lot of time during that very short negotiation period. It was not a forgone conclusion that these lenders were going to fund into Europe to companies that were outside the direct purview of this Court. It was not an easy thing to accomplish and yet we did it.

Another very important feature, Your Honor, that we heard nothing about during this hearing, but we heard a lot about during the interim hearing was that the lenders in this facility have also agreed to forbearances and those forbearances go to the exercise of remedies under the senior secured and bridged facilities. And the reason we needed those forbearances, Your Honor, was because many of the obligors and guarantors under those facilities are European entities who are not in Chapter 11.

Fortunately, under the senior-secured indenture, if fifty-one percent of the holders of that debt agree to forbear, they bind everyone. And so, in addition to counting pennies and -- we were counting pennies even to get to $8 billion. In addition to counting pennies we were counting percentages. So we needed to achieve not only the money we needed, we needed enough holders of the senior-secured to get us this forbearance.

By the way, Your Honor, all of this explains why the Bank of New York was not invited to this party. Nothing intentional about excluding them other than that it would have been pointless to invite them. The Bank of New York is an indenture trustee. They were not going to lend money into this facility. They represent a bunch of noteholders. Whether or not the noteholders would have been willing to participate, who knows, but how could you find out? You can't just send out a

message to all the noteholders, Lyondell's about to file bankruptcy, they need a DIP loan, do you want to sign up.

First of all, there are securities laws issues with that, and second of all, there's the obvious issue that you just can't broadcast a message like that, and, also, you know, it's too many small pieces scattered all over the place. We had two weeks -- we had less than two weeks to get this done. It was pointless to exert energy on that kind of effort.

Another large point, Your Honor, that's been somewhat lost in the shuffle is that the key to getting this loan at the end of the day was the roll-up. We had no term loan without the roll-up. It was clear there was a stand-off. The parties willing to participate in the term loan needed the roll-up to make it effective.

Again, remember, Your Honor, the credit markets are frozen. There is no independent DIP lending source out there. This is a defensive DIP being made by lenders who already had a stake in this company through pre-petition secured financings. Their price to get into this DIP was to be able to roll up some of that debt.

The problem the debtors had and many of the lenders, particularly the bridge lenders who were going to put the ABL together also had was that if you layered the roll-up onto the new money, you were going to have a facility that likely would not be financeable at the end of the case.

And so the compromise --

THE COURT: That's why you have the reinstatement feature?

MR. ELLENBERG: Yes, Your Honor.

And so the compromise -- and it was critical and, again, I believe it's unprecedented -- is that they would get to roll-up but we could restructure them at the end of the case.

Now, there's some bells and whistles around that, but the big point is that we don't have to refinance the roll-up at the end of the case if we're not capable of refinancing the roll-up at the end of the case. Another way to think about it is that they are moving up in priority but are otherwise being treated as pre-petition debt. It was a huge breakthrough and it's what made this facility possible.

Now, counsel for the committee talked about how there's competition to get into this facility that's so attractive. Well, Your Honor, that competition only occurred after the roll-up was agreed to and the senior secured lender community was made aware that that feature was available to them. And the people who bought into the syndication that we heard testimony and argument about, they have bought into that syndication to get the benefit of the roll-up and for no other reason.

And again, Your Honor, the record is even with all of

that, this DIP is trading today below par.

One more big picture point, Your Honor. I want to echo Mr. Goffman's remarks. We need this loan and we need it now. We've managed to limp through this far on the interim authority. There are huge expectations among our lenders -- our vendors and creditors about our securing this financing and we need it to survive and we need it soon.

Let me turn, then, more specifically, Your Honor, to the committee's objections.

After all the "sturm and dang," we're down to four issues: Short maturity date; milestones; untested covenant package; management review. Let's talk about each of them separately. But, first, let's talk about them as a group and go back to the big picture.

Again, Your Honor, the committee has conceded that the DIP is essential. The committee has conceded that the DIP is market. He said, quote, "There is no alternative. This is an unprecedented facility in size and scope. In effect, the lenders set their own market."

Now, he tried to limit that comment to the cost feature, which he had objected to previously but abandoned in his closing argument, but, Your Honor, this facility is a package. Okay. This was negotiated as an integrated whole. The term sheet and, ultimately, the resulting credit agreement represent a multitude of trade-offs, a multitude of

compromises. Nothing was free. Anytime anyone got something it was because they were giving up something. And so this is presented to us as a package and that was the way we had to assess it.

Now, Your Honor, the colloquy with Mr. Huebner yesterday certainly made clear -- and we fully agree -- that Your Honor can refuse to approve this facility, and Your Honor can state clearly why you refuse to approve it and that if certain features were removed, you would approve it, and clearly Your Honor can do that. But as Your Honor also observed, you cannot force the lenders to accept the revisions that you suggest.

Now, counsel for the committee called this a massive game of chicken. Your Honor, I think it is more like a massive game of Russian roulette and, unfortunately, the gun is pointed at the head of the company.

THE COURT: Or is it both?

MR. ELLENBERG: That is -- that's --

THE COURT: This is a problem that we bankruptcy judges, every time we have an aggressive DIP --

MR. ELLENBERG: I understand, Your Honor, and it's the problem the debtor has every time it's trying to negotiate a DIP. But let me say this. If there's only a ten-percent chance that the lenders will say no, if there's only a one-percent chance that the lenders will say no, is the reward

worth the risk? That's -- in the debtors' business judgment, it wasn't, and I think that's the question the Court needs to answer for itself and I know the Court will do that quite ably.

So let's focus down a bit on what the risks are, what the specific criticisms are. Let's start with the maturity date, Your Honor.

Would we have preferred a longer facility? Of course. Did we ask for a longer facility? Absolutely. The record is clear, Your Honor, it's clear from every single witness who testified, including Mr. Dugan, that all the lenders had a one-year horizon. They were surprised by the need. They were surprised by the extent of the need. They felt that they didn't have good visibility into the company. They felt that they didn't have good visibility into the economic situation. They were not going to hand over $3 billion in new money and $1.5 billion in continued liquidity for more than a year. It was not going to happen.

The debtors did push back. We pushed back hard. Mr. Bigman testified to that. Mr. Celentano's (phonetic) declaration testifies to that. Mr. Jaffe testified to that. As to Mr. Dugan, I can only say a couple of things. Number one, he wasn't there at the very beginning of the term sheet process, which is when most of these discussions occurred, and, number two, perhaps his memory is a bit clouded by the blur that those final ten days of the year were.

But, Your Honor, I think there is persuasive evidence in the record as to what happened and, frankly, Your Honor, I was there and, as an officer of the court, I can tell you we pushed back hard on this issue, the lenders, when it transferred.

As to the calendrical issue, Your Honor, everyone talked about a year. Our goal and the stated deadline was to actually to file this case before the end of the year, and so everyone was thinking in terms of calendar year 2008.

The reason the December 15th date was moved was, as Mr. Dugan said and I think Mr. Jaffe also said in his deposition, everyone had just spent Christmas to New Year's in Cadwalader's conference rooms. They didn't want to have to do it again at the end of this year. So the maturity date was moved to December 15th instead of December 31st, but everyone was thinking in terms of one year and the assumption was that the filing was going to occur before the end of the year, and it only slipped into January because the term sheet just hadn't been completed yet. But everyone was thinking in terms of one year and they had already gone to committee and gotten it approved with that date in it.

Now, you can say, well, go back to the committee, slip it a week. I can't emphasize, Your Honor, how fragile this agreement was. Again, it's easy to take it for granted now. This was a terribly fragile situation. Any time one issue got

reopened, no matter how small, and this one was more than small, a hundred other issues reopened, and lenders were coming in. They were dropping out. There was constant jockeying, constant moving, and constant negotiating, and every time we sent out a final version of the term sheet it came back with even more comments than we had the last time.

And so this was an extremely fragile situation. Our goal was to take what we had and get into court because, again, at the end of the day we were getting the largest DIP in history and whatever its problems, it was going to permit this company to stay alive and have a chance to reorganize.

Your Honor, the committee cited Smurfit and Aleris's comps. As Mr. Huebner remarked, they are odd comps in that they came after this DIP rather than before it. As Mr. Huebner also noted, Smurfit is an ABL facility, not a term facility. I believe also, Your Honor, that size -- committee counsel said they were comparable in size to our DIP. In fact, Smurfit, I believe, is $350 million and Aleris, I believe, is $500 million in new money.

In addition, Your Honor, there is a question about --

THE COURT: Pause, please, Mr. Ellenberg.

MR. ELLENBERG: Yes.

THE COURT: Where are those two loans procedurally? Are they at the interim DIP approval level or at the final DIP approval level, or what?

MR. ELLENBERG: I believe interim, Your Honor.

MR. HUEBNER: I can take that up.

MR. ELLENBERG: Yeah.

MR. HUEBNER: Your Honor, Aleris is between interim and final and Smurfit was, I think, recently finally approved.

THE COURT: All right. Thank you.

MR. ELLENBERG: Your Honor, on the issue as to whether we can get this all done in a year, clearly it's aggressive. This is a big case. There's a lot to do. But at the end of the day, Your Honor, the problem this company confronts and the problem that ultimately drove it into bankruptcy is that they have an interest burden of $1.3 billion a year. That figure comes from the Daneen (phonetic) declaration. It is a crushing burden of $1.3 billion of interest a year that this bankruptcy case is about. That particular problem is not that hard to fix in Chapter 11 and that is the main problem we need to fix.

I'd also like to talk, Your Honor, about the ability to extend this facility and to refinance it. Committee counsel somewhat denigrated that provision, said, what's the big deal, of course you get to repay your loan, that they were giving you the sleeves off their vest. Not really, Your Honor.

First of all, Mr. Huebner noted that DIPs often have lock-out provisions and prepayment restrictions associated with them, but there's a much more fundamental issue than that and committee counsel expressed uncertainty about it but it's an

issue as to which we need to be certain.

We can refinance this, only the new money portion. We get to roll the roll-up. It's a key point. The refinancing is about the new money only. Just like we can restructure the roll-up when we do a plan, we can keep the roll-up rolling if we refinance during the case.

Now, you'll say, okay, what's so hard about that? Well, it is hard, Your Honor, because the roll-up loans are governed by the credit agreement. The same covenants apply to the roll-up loans. The same governance provisions apply to the roll-up loans. And so what -- how do you deal with a situation where you've repaid the new money, replaced it with a new facility, with a new credit agreement, but you still have the roll-up loans continuing under this other agreement with covenants and things that --

THE COURT: Clarify that.

MR. ELLENBERG: -- may not make sense anymore?

THE COURT: The roll -- when you said the roll-ups are subject to the credit agreement, you mean the pre-petition credit agreements?

MR. ELLENBERG: No. No. No, Your Honor. The DIP credit agreement.

THE COURT: Well, that's what I thought but then I'm confused. So the roll-up loans provide a repayment on account of pre-petition debt but are also capable of being refinanced

at the end of the case --

MR. ELLENBERG: Correct.

THE COURT: -- and thereby being treated, in many respects, like pre-petition debt?

MR. ELLENBERG: Correct.

THE COURT: But what would be the underlying documentation that would dictate their terms? Would it be pre-petition senior secured documentation, or would it be DIP financing documentation of the type that I'm asked to approve today?

MR. ELLENBERG: Well, it's a combination, Your Honor. As to things like events of default and maturity date, the existing credit agreement -- the DIP facility credit agreement, the one you're being asked to approve, those provisions as to maturity date and covenants also apply to the roll-over. And that mechanical problem is part of what had to be negotiated through in terms of making it possible for us to refinance the new money but keep the roll-ups in place.

THE COURT: Now, after exit from the existing 11, assuming everybody in the room is successful in accomplishing that, what would be the underlying economic terms of the refinanced roll-up debt or is that yet to be determined?

MR. ELLENBERG: Whatever the plan says, Your Honor.

THE COURT: Okay.

MR. ELLENBERG: There are certain limitations on what

we can do in the agreements, but within those constraints it's whatever the plan says.

THE COURT: Okay.

MR. ELLENBERG: Now let's turn, Your Honor, to the milestones. I don't like the milestones. They're annoying and, I think, somewhat petty. But this is what happens when you throw a bunch of bankers and hedge funds into a room and tell them we need $5 billion between Christmas and New Year's.

It's part of the package, Your Honor. We negotiated them as well as we could. We can live with them. We have to live with them. I wish they weren't there but I don't think they're fatal, Your Honor. I don't think they're remotely fatal, again, in the context of this entire package.

The covenant package, Your Honor. The record is clear that this was vetted thoroughly by the company. It was negotiated by the company. And I would also suggest, Your Honor, that the committee's view on value necessarily implies that the covenants will be met, particularly the EBITDA covenant.

You'll remember the cross-examination of Mr. Bartell by committee counsel and the conversation about how EBITDA drives valuations and how a higher EBITDA leads to a higher valuation. Well, committee counsel has stated forcefully that they think the Duff & Phelps current valuation of the company on which these covenants were based is way too low, that

there's much more value there. Well, that necessarily implies a higher --

THE COURT: Well, that --

MR. ELLENBERG: -- higher EBITDA.

THE COURT: Yeah. But that's also a function of the multiplier, isn't it? I mean, isn't the main driver of enterprise value EBITDA or its cousins?

MR. ELLENBERG: Yes. That's right, Your Honor. And so when they say there's a higher value, they are implicitly projecting much better EBITDA than the company's current projections. That's the whole point. And so the company is comfortable that they have plenty of headroom under these covenants.

And in all events, Your Honor, the suggestion in the committee's papers that these are bad faith trick waters is just in no way supported by the record. These are usual covenants that were presented in good faith for understandable lending reasons and were negotiated hard by the company to get to a reasonable point.

The management review provision, Your Honor. I understand the Court's concern that there may be some *in terrorem* effect associated with that provision, and so let's talk about that.

The genesis of the provision, Your Honor, is quite different and really quite understandable. As the record makes

clear, the lenders were very shaken when they were told in the middle of December what the situation of this company was. Any reasonable lender, particularly one who is about to be asked to fork over another 3.25 billion of new money plus continuing ABL liquidity of 1.5 billion is going to say, who am I giving this money to, is it the same management who just burned through the $20 billion we loaned them a year ago, who just surprised me and told me they're virtually out of money with no notice? It's a lot to ask.

And so their response was, we want to take a look at what's going on here, we want to take a look at who's running this company, who's calling the shots, and what procedures do they have so that we're comfortable that we're giving our money to a competent entity. It's completely innocent and completely understandable.

Now, could that, whatever its intentions, have unintended consequences *in terrorem* effect? Well, maybe, Your Honor. But I think this management has shown in very concrete ways that it's willing to do the right thing when it has to do the right thing.

And one example of that, Your Honor, is the first day here. Your Honor will recall that the original DIP package had access as a funder under the DIP and the -- among other things, Access was going to purchase senior secured debt to participate in the roll-up. A group of other senior secured holders

objected to that and gave the debtors an alternative package which would exclude Access and they did one other thing: They made the package better. They reduced the pricing. They eliminated some fees.

When the company was presented with an improved financing package, they took it. Mr. Bigman made the call. He consulted with his advisors. Mr. Daneen was also there. Management was there. They consulted their advisors. They were informed about what their responsibilities were and they did the right thing, and so they took a DIP package that excluded Access. Was Access happy about that? No, they weren't. You recall Mr. Goffman that night. He wasn't happy at all. His client wasn't happy, okay. But the company management did the right thing.

Another example, Your Honor, Mr. Bigman was on the witness stand and I think it's the single most dramatic moment in this hearing. Maybe that's not such a hard bar, but I think the most --

(Laughter.)

MR. ELLENBERG: I think the most dramatic moment in the hearing was when Mr. Bigman was on the stand and he was asked, do you think that the management of this company should be changed. Wow. What a hard question to ask the CFO of this company sitting in that chair in open court under oath in front of Your Honor. And what did Mr. Bigman do? He sat there. He

thought very hard and he said, you know, maybe it should be changed. How difficult was that for him to do? It had to be extraordinarily difficult. How easy would it have been for him to say, you know, we may not be perfect but we're the best management for this company, I think we're doing a great job? That would have been the easy answer. That would have been the political answer. It's not the answer he gave, Your Honor.

I think this management has shown that it has backbone and that it understands what its fiduciary duties are in this case and that it's going to fulfill them.

Finally, with respect to the committee, Your Honor, the committee made a plea for cooperation, for them to be in the loop, to understand what's going on in the company, to assist the company in its reorganization effort and, of course, Your Honor, we pledge cooperation. I think, Your Honor, in fact, we've stood on our heads to cooperate with the committee up to this point, to get them into this process. Committee counsel, I'm sure, has a different view of that. I don't think the "who struck John" is a productive conversation at this point but we will, going forward, give the committee all the cooperation it wants and needs.

Let's turn now to the Bank of New York. The Bank of New York, Your Honor, has two basic problems with their position. One of them is the facts; the second one is the loan. Let's start with the facts.

There's an inherent contradiction in how counsel for Bank of New York describes the situation. At first he says he's the same as the senior secureds. It's the first thing out of his mouth. But then he spends most of his time talking about how he's different. In fact, the very last thing he said to you leaving the podium was, we want the same treatment as the senior secureds and we want to be compensated for the loss of our separate entity liens. It's an inherent contradiction, Your Honor.

And the fact is they are not the same. They are different and they are different in ways that make them materially less well off than the senior secureds. And what they are getting, Your Honor, is something that makes them materially better off than they are as a pre-petition state of facts, and, as Mr. Huebner suggested, it may be, on a relative basis, the best package that anyone in this case is getting.

So, again, Your Honor, their liens were limited. Okay. The ARCO notes have liens on the assets of Lyondell Chemical Company. Period. End of story. Nothing else. The Equistar bondholders have liens on the assets of Equistar. Period. End of story.

I think what we need to do now, Your Honor, is take a look at our equity cushion analysis. Your Honor, that is Exhibit J to the Hawkins' declaration that was filed. I have extra copies here if Your Honor would like.

THE COURT: Let me just check mine for a minute.

(Pause in proceedings.)

THE COURT: I have mine handy, Mr. Ellenberg. Thank you.

MR. ELLENBERG: Okay.

THE COURT: I don't need it.

MR. ELLENBERG: So, Your Honor, again, to set the stage, as the record shows, this company had pre-petition debt consisting of 12.19 billion as of the petition date of senior secured financing. The ARCO notes were 3.35 million as of the petition date. The Equistar notes are 150 million as of the petition, so that the ARCO and --

UNKNOWN: You mean 360 -- you meant 325 million, right?

MR. ELLENBERG: Yes. So that the -- it's 325 million for ARCO, so that the ARCO and Equistar together are 475 million. When you add that to the senior-secured, Your Honor, you get 12.665 billion. Now that doesn't include, Your Honor, the bridge. The bridge is an additional 8.3 billion secured but junior to the senior and to the ARCO and Equistar notes.

And, again, Your Honor, the ARCO and Equistar notes actually started out as unsecured debt. They got their liens when the LBO debt was put on the company and their equal and ratable clause entitled them to secured status. So they actually started out in life as unsecured creditors.

So the first page, Your Honor, of the -- of Exhibit J goes through and gives the detail on the 12.665 billion in debt.

Your Honor, the next page talks about the new facility. We have the 3.25 term loan. We have the 1.5 billion working capital facility. There is an accordion feature. We'll leave that out for the moment. And then we have the roll-up which, of course, gets deduced from the senior secured amount. So we have total priming debt of $8 billion.

We turn to the next page, Your Honor. We add the 8 billion of priming debt to the balance of the senior secured facility. Now, that had been 12.19 billion, but it's now 8.940 because of the roll-up, and then we add ARCO and Equistar, and so we have total debt -- above the bridge -- secured debt of $17,415,000,000.

The next page, Your Honor, talks about the Duff & Phelps business enterprise value midpoint, which is $19.2 billion. We subtract from that the 17.415 billion representing the total secured post-petition debt, excluding the bridge, and that gets us an equity cushion above the bridge of $1.785 billion.

On the final page of the exhibit, Your Honor, we add together the unrolled up senior facility and the ARCO/Equistar notes, which gives us 9.415 billion of primed debt. When we use the --

THE COURT: Pause, please.

MR. ELLENBERG: Yes.

THE COURT: On the last page after where it says notes under senior facility agreement, that's the ARCO and Equistar?

MR. ELLENBERG: Yes. Yes, Your Honor.

THE COURT: Go on, please.

MR. ELLENBERG: Okay. So the total debt being primed is 9.415 billion. When you divide that into the equity cushion of 1.785 billion, we have an equity cushion of nineteen percent.

Now the case law, Your Honor, suggests that anything over ten is acceptable. We have virtually double the minimum equity cushion. As a matter of law, under Section 364, that entitles us to prime the ARCO and Equistar debt.

Now I must point out, Your Honor, that the reason it is proper to view their equity cushion on a business enterprise basis is because the adequate protection liens they're getting gives them a lien on the entire business enterprise. They didn't have that when they started. Okay. It's what they're getting under this facility and, as Mr. Huebner pointed out yesterday, there's more. They also get a lien on the ABL assets. That's not even reflected in that equity cushion analysis. So the equity cushion is nineteen percent plus their adequate protection liens on the ABL assets.

Now, what does Bank of New York say about this? Well,

first, Your Honor, they talk about marshaling. They say you're taking away my right to marshal the assets. Well, Your Honor, that cannot possibly be an issue anymore. Marshaling is only an issue where you have a lien on one asset and *pari passu* lenders have a lien on your asset plus many others. We've now given them the exact same collateral package as the senior secureds, exactly the same, and so the marshaling issue is gone. It's eviscerated. It makes no sense to even be talking about it anymore.

And even then, Your Honor, the marshaling analysis itself actually relies on the same equity cushion, okay, because the only benefit you get from marshaling is to be able to spread that *pari passu* debt over other assets. Well, if there's no value in those other assets, then the marshaling doesn't do you any good, and so their argument is ultimately circular. If -- either the equity cushion is there or it isn't; that's the only way marshaling makes a difference to them.

Now, they don't actually attack Duff & Phelps at all, Your Honor. In fact, they embrace Duff & Phelps. So let's look at what their expert, Mr. NaJane, actually says, and in particular, let's look at Paragraph 20 and then Paragraph 21 of his declaration.

(Pause in proceedings.)

THE COURT: Go ahead.

MR. ELLENBERG: So in Paragraph 20, and this is under the heading of, "Conclusions," Paragraph 20, Mr. NaJane says:

"Assuming the validity of the Duff & Phelps analysis -- assuming the validity of the Duff & Phelps analysis and without considering the proposed replacement liens, Broadpoint has concluded the following with respect to the ARCO notes."

So, again, Your Honor, these are the notes secured by Lyondell Chemical Company. And the first conclusion is:

"Prior to the petition date, assuming the availability of the marshaling doctrine, the ARCO notes were oversecured by approximately 1.943 billion or 597.9 percent."

Well, let's unpack that sentence. What does that really mean? It means he's accepting the same equity cushion that I just demonstrated to Your Honor of nineteen percent. Through the marshaling doctrine he's spreading the other senior secured debt equitably to all the other assets and he comes out with this equity cushion. So he's embracing the Duff & Phelps analysis of value to get to Bank of New York's fundamental position that they are sitting oversecured at the Lyondell Chemical Company.

And, again, it depends entirely on the existence of value as found by Duff & Phelps at the entities other than Lyondell Chemical because if there was no value at those other

entities, they're not oversecured. In fact, Your Honor, the Duff & Phelps report separately values Lyondell Chemical Company and Equistar. It values Lyondell Chemical Company at 11 billion. So without marshaling they are undersecured at Lyondell Chemical Company because they're *pari passu* with 12.1 billion of senior secured. So that exceeds the 11 billion, okay. So it's only the existence of an enterprise equity cushion that permits them to say that they are oversecured.

THE COURT: All right. Pause, please. So when he says in Paragraph 20(a) they were oversecured by 1.943 billion, you're saying he's just in error in that because by reason of the other pre-petition senior-secured debt being *pari passu* with it on that collateral base, actually, it was undersecured?

MR. ELLENBERG: Well, Your Honor, you have to go back to his qualification which is assuming the availability of the marshaling doctrine. So --

THE COURT: I see.

MR. ELLENBERG: -- what that means is that he's spreading that 12 billion over the other entities.

THE COURT: He's laying it off on the other entities.

MR. ELLENBERG: Exactly.

Now, similarly, Your Honor, the Duff & Phelps report, which is in evidence, values Equistar at 2.4 billion. So he's got an even bigger problem there because, again, he's *pari passu* with $12 billion of senior-secured debt.

And that gets us to Paragraph 21, which says:

"Assuming the validity of Duff & Phelps' analysis and without considering the proposed replacement liens prior to the petition date, assuming the availability of the marshaling doctrine, the Equistar notes were oversecured by approximately 1.899 billion."

Well, it's the same hocus pocus, Your Honor.

So two points:

One, they're only oversecured if you agree that there's value in the other enterprises; and

Second, they're embracing Duff & Phelps. They're not attacking Duff & Phelps. They're embracing Duff & Phelps.

What they then say is, well, you know, Duff & Phelps could be wrong because, you know, the markets are volatile and who knows, it's -- you know, it's Duff & Phelps opinion.

Yes, of course, Your Honor, that's true. That's true every time you value a company. That's why the cases require that the equity cushion be more than ten percent, okay. But we've exceeded that, Your Honor. They have a nineteen percent cushion. That's their cushion against volatility and that's all the cases require.

And, in fact, Your Honor, their -- Mr. NaJane's argument really proves too much because if he's right, that volatility erodes the business enterprise value equity cushion, then he isn't oversecured, he's undersecured and they've just

talked themselves out of interest.

So they can't have it both ways. If they're embracing Duff & Phelps, who really is uncontested, Your Honor, then there's a nineteen-percent equity cushion, they're adequately protected and that's all the law requires.

In addition, Your Honor, Bank of New York complains that it doesn't matter if we're adequately protected by an equity cushion. We're entitled to interest subject to a cash flow test because other people are getting that. The senior secureds are getting it. We're *pari passu* with them. If they're getting it, we're entitled to get it. Well, not surprisingly, they don't cite a single case for that proposition.

What 364 says is you can prime a lien if you're giving them adequate protection. We're giving them adequate protection. I've just proved it. What other people are getting doesn't matter. Okay. We had to give other people what we gave them to get them to lend us 3.25 billion in new money. Okay. There's no requirement in any case or in 364 that just because somebody else is getting something, they have to get it as long as they're adequately protected.

And again, Your Honor, while he wants to be like the senior secureds, he clearly isn't like them. He's different from them. And so even if that principle had some legal basis, which it doesn't, he has no factual predicate for it because

they aren't just like the senior secureds.

Then next gets us, Your Honor, to the roll-up. Again, they say other people are getting the roll-up, we should get the roll-up. Two problems with that.

First of all, Your Honor, the roll-up is not -- the roll-up is not adequate protection. It clearly was an inducement to get people to give us new money. It is not adequate protection and the case law is clear. We cited it in our brief. You don't have to offer a DIP to anyone who wants to participate in it. As long as you're getting the best terms you can get, you don't have to open a DIP up to auction for anyone who wants to participate in it to participate in it. So they have no legal right to demand entry into the DIP.

But even if the adequate -- even if the roll-up were adequate protection, Your Honor, again, there's no legal requirement that they have to get it. They're already adequately protected. They're adequately protected by their equity cushion. Even if the roll-up was adequate protection, there's no case that says they have to get it just because somebody else is.

The final issue, Your Honor, is that we've, in effect, substantively consolidated the debtors. Well, nonsense. Mr. Huebner's dealt with that. We're going to continue to track assets. We're going to continue to track liabilities. We're going to track the intercompanies, and Mr. Huebner addressed

the priority point. I won't repeat it.

But there's a further issue here, Your Honor. What counsel for Bank of New York said they wanted was their own DIP loan. They said, just lend to us, let us borrow for ourselves, in fact, we're not even sure we need a DIP loan. And all of that is just at odds with the record.

First of all, the record is clear -- Mr. Bigman testified. We put in an exhibit -- that ARCO -- that Lyondell Chemical Company and Equistar are huge consumers of the DIP loan. You asked yesterday Mr. Huebner about whether the $1.4 billion number he gave you was net of intercompanies. No, it is not. The net intercompany number, Your Honor, was 300 million; that over a thirteen-week projection Lyondell Chemical was expected to consume net 300 million of the DIP as an operating deficit.

The record is similar for ARCO -- for Equistar. They are both consumers, net consumers of these DIP loans.

In addition, Your Honor, Lyondell Chemical benefitted enormously from the pay-down of the pre-petition asset-backed facilities. There was an inventory facility and some receivable securitizations. Those were paid down in part through the term loan and in part through the new asset-backed facility. And Lyondell Chemical was a huge indirect participant in those facilities and, thus, benefitted tremendously in real dollars --

THE COURT: Well, you're saying --

MR. ELLENBERG: -- by those facilities being paid down.

THE COURT: -- the debt that was paid down was the old pre-petition revolver?

MR. ELLENBERG: Yes, Your Honor. There was an inventory revolver and then there were -- technically, they were securitizations for the receivables. But those were both paid down.

THE COURT: Okay.

MR. ELLENBERG: And the final point on that, Your Honor, not only are they consumers and thus need the DIP loan directly, but they can't get their own DIP loan. Bank of New York counsel complained that his entities were propping up the rest of Lyondell. That's simply not the case and the record doesn't reflect it.

What the record reflects, particularly Mr. Bigman's testimony -- and by the way his testimony in this case, not in the 105 injunction case which also would support it -- is that these companies operate on an integrated basis. This is a horizontally and vertically integrated enterprise. These entities are constantly buying and selling inputs and outputs to each other. That's part of the synergy of the business.

The lending community obviously views them as an integrated whole. That is why the senior secured financing

pre-petition and the bridge loan pre-petition are cross-collateralized all over the place. They're cross-collateralized in the U.S. They're cross-collateralized in Europe. Given all that cross-collateralization, who would come in as a DIP lender and say, well, I'm just going to lend to that company. It was never a realistic goal and it certainly wasn't a realistic goal in the time frame that we were presented with.

So, Your Honor, I think for all those reasons, the Bank of New York's objections should be overruled.

That gets us, Your Honor, to Law Debenture. I won't spend a lot of time on that. I think the Allegheny case is dispositive and they try to weasel out from under that case by saying, well, we're different because the pre-petition credit agreement makes certain promises and now the pre-petition lenders are breaking that promise.

Mr. Huebner suggests that that promise isn't really there. But, again, even if it is, Your Honor, the DIP lenders are not coming back in their capacity as the pre-petition lenders. They're coming back in a wholly different capacity. And if, for example, this was a full third-party DIP, Law Debenture couldn't be making this argument, and the fact that you have the same entities coming in to give the DIP doesn't change the fact that they're doing it in a completely different capacity and shouldn't be bound by that agreement.

And ultimately, Your Honor, it really has to be an unacceptable premise that unsecured indenture provisions pre-petition have any impact on a DIP loan. They simply don't and I'd suggest that's why there aren't a lot of cases on it.

And I don't think it's a question of rejection, Your Honor, at all. I think it's a question of pre-petition debt matures and accelerates on account of the bankruptcy, and we can restructure it and all those pre-petition covenants and whatever are gone. They were gone the moment we filed the petition. So I don't think I need to make a motion to reject.

What that brings me back to, Your Honor, are the Farmland factors, which is the standard by which this Court needs to assess this facility and make its decision.

So, Your Honor, the exercise of sound and reasonable business judgment, I don't see how there could be any doubt at this point on that question, particularly with the committee's statement that this was, indeed, the only game in town and it is better to have this DIP than to have no DIP.

Was alternative financing available on another basis? Again, Your Honor, I think we have to be past that. The committee has conceded that.

Are the terms fair, reasonable and adequate given the circumstances? Well, Your Honor, I think "given the circumstances" is the operative part of that sentence that needs to be focused on. Yes, given the circumstances it's just

amazing that we're here at all. So, unquestionably, the terms are fair, reasonable and adequate.

Negotiated in good faith and at arms length. It could not have been more at arms length and I believe the record is clear, Your Honor, that it could not have been more in good faith.

And so, Your Honor, for all those reasons I would ask that the objections being overruled and the DIP be approved.

Thank you.

THE COURT: All right. Thank you.

Ms. Martin, you would be next. How long do you think you're going to be?

MS. MARTIN: Well, Your Honor, on these points I only had probably about ten minutes. I was going to respond to ABN AMRO --

THE COURT: Oh, I see.

MS. MARTIN: -- and that's why I was going to try to go after ABN AMRO.

THE COURT: All right. We're going to take a break in a minute for about ten minutes. But before we do, on the tax claims, Mr. Sonik, do you have anything you want to add to your argument?

MR. SONIK: Yes, Your Honor. I'd like to suggest that Section 364(c) is not applicable to this situation because it did not authorize lien -- the granting of liens on property of

the estate that are otherwise subject to liens, which clearly the post-petition Texas tax liens would -- claims would be.

THE COURT: You want to say that again, please. I'm not sure if I followed it.

MR. SONIK: Yes, Your Honor. Section 5 -- I'm sorry -- 364(c)(2) permits the granting of liens on property of the estate only when that property is not otherwise subject to liens.

THE COURT: Right. But what about (c)(1)?

MR. SONIK: I'm sorry. Well, I think that fails -- it fails to take into account the -- position of the tax lien, Your Honor. We agree that 364(c) permits the granting of credit with administrative priority over the right of the Texas taxing entity to request administrative payment under 503(b), but does not permit the granting of a lien on property if it's otherwise subject to the tax liens.

So we have this bifurcated character of the Texas tax lenders, the in rem and the in personam character. Here the in rem character is being ignored by the DIP lenders.

THE COURT: All right. Well, I think I understand your argument. Okay. Anything else you'd like to -- me to focus on?

MR. SONIK: No, Your Honor. I think the Court understands our position.

THE COURT: All right. Thank you. All right. We'll

take ten minutes and we'll resume at that point.

(Recess taken at 10:21 a.m.)

(Proceedings resume at 10:35 a.m.)

THE COURT: Have seats everybody. Who's next?

MR. HUEBNER: I believe nobody, Your Honor. Other than the ABN issue, we are done.

THE COURT: All right. I'll hear the ABN issue. Mr. Weisfelner.

MR. WEISFELNER: Your Honor, if I might. I know we spent a lot of time on what I'll refer to as parochial issues: Bank of New York, Law Debenture, the taxing authorities. And I would pray that Your Honor, in terms of the perspective of the statutory committee representing all unsecured creditors, while he probably didn't mean to, we got an awful lot of testimony from Mr. Huebner. We got an awful lot of characterizations of the evidence and we were treated with an entire compendium of information that was prepared overnight. I think Your Honor has already discerned that what's critically important to this committee is maturity and milestones above all else.

And, Your Honor, claiming the prerogative of the representative of all unsecured creditors, and while I appreciate that the ABN AMRO issue is important, as is everyone else's issue, I'd like an opportunity to briefly respond to the more than, I think, close to two-hour argument that Mr. Huebner gave.

THE COURT: All right. After we take the ABN AMRO argument, I am going to give you an opportunity -- a brief opportunity, not anywhere near comparable to the time you took the first time, to reply and I'm going to give your opponents an opportunity after you say that to surreply.

MR. HUEBNER: Your Honor --

MR. SIEGEL: Your Honor --

MR. HUEBNER: -- is that true for all objectors or merely --

THE COURT: No. Just the --

MR. HUEBNER: -- for Mr. Weisfelner?

THE COURT: -- creditors' committee.

MR. WEISFELNER: Thank you, Your Honor.

THE COURT: We're not going to repeat the entire process.

MR. SIEGEL: Your Honor, I had indicated earlier that I was going to make the same request. With respect to Mr. Weisfelner, a good part of Mr. Huebner's presentation yesterday dealt with our issues and I think that there are certain clarifications that would be made appropriately.

MR. ROSENBLOOM: Your Honor, and I apologize. I would make the same request on behalf of Law Debenture. I can assure you it will be very short. But there has been a misrepresentation of these facts again.

THE COURT: Folks, I'm going to give you each a few

minutes to reply. But let me make something clear, folks, because the steam is starting to come out of my head.

If you were arguing in the Second Circuit or the U.S. Supreme Court, you would have gotten fifteen minutes, twenty minutes, or if you were lucky, thirty. I have set a new indoor record for allowing oral argument on this matter and there are very practical limits on the extent to which I can ask people -- or allow people, forgive me, to orally supplement the comments they put in their papers.

We're going to do it, but we're going to do it fast. And, Mr. Siegel, for instance, I don't know how long I let you talk when you aren't the creditors' committee and I'm just not in a position to permit that going forward.

Ms. Schonholtz.

MS. SCHONHOLTZ: Thank you, Your Honor. Margot Schonholtz of Kaye Scholer for ABN AMRO.

ABN is the largest pre-petition secured creditor in this case. It is owed approximately $3.4 billion according to Mr. Bigman's first-day affidavit. It is a third of the debt that is being primed here per Mr. Ellenberg's demonstrative this morning.

It is a long-term holder. There is no CDS or total return slot protection on its debt, and it has and will continue to support this company. Indeed, it stepped up at the interim hearing to fill a void left in part by the Access

leaving the DIP.

It understands the need for DIP financing. It has no issue in continuing as a large participant in the ABL DIP and the European securitization. It is okay with being primed as contemplated by the DIP order and the DIP documents.

ABN's limited objection to the term DIP has been mischaracterized or misunderstood as an entirely intercreditor dispute among DIP term lenders. That is simply, Your Honor, not the case.

The focus of the objection is that very specific aspects of the proposed financing order and in the proposed amendment to a pre-petition credit agreement are not fair or reasonable to the pre-petition secured lenders. ABN is not objecting to the roll-up. It is only objecting to the effects on non-roll-up pre-petition secured lenders if the rolled-up loans are deemed to be a refinance or repayment of those rolled-up loans under the new DIP facility.

The DIP agreement, not the DIP term sheet, provides that roll-up loans will be reflected in new notes, will have full voting rights under the DIP, will be receiving payments through the DIP agent, and will be administered under the DIP documents. Mr. Ellenberg also explained this morning that the DIP documents contain the events of default, covenants, and maturity date with respect to these rolled-up loans now.

Some could argue that the DIP structure constitutes a

repayment or a refinancing of the rolled-up pre-petition loans.

After the interim hearing, the testimony is that the DIP term agent hired Allen & Overy to consider the structure. Thereafter, novel provisions were placed in the DIP order, specifically 10(e), Paragraph 10(e), and an amendment to a pre-petition credit agreement was drafted. Thirty-nine debtors need to deliver an amendment as a closing condition, and the DIP and roll-up lenders and their assignees are deemed to have consented to and be a part of that amendment.

And those requirements are reflected, Your Honor, in Sections 402(e) and 10.22(c) of the current, I believe, version of the DIP credit agreement.

THE COURT: 10.22(c) did you say?

MS. SCHONHOLTZ: Yes, Your Honor.

The effect of these novel provisions is as follows:

If the roll-up loans are deemed to be repaid by virtue of the DIP provisions and thus lose their claims against foreign debtors and non-debtor loan parties, and thus their assets, then the non-roll-up lenders, which still have good claims, suffer involuntary claim dilution by having an amount of roll-up loans added back to share in their claim recoveries.

Let's do the math, Your Honor, with respect to hypothetical numbers. And, again, the press is here. This is not any reflection on any valuation. I'm just using numbers as an example.

Assume the U.S. assets are worth about 5.5 billion and the foreign assets are worth about 3.5 billion. Of the $6.5 billion DIP facility, there's new money of 3.25 -- this is a term facility, Your Honor -- and rolled-up loans of 3.25 billion, leaving 8.75 billion of first lien loans that are not rolled-up.

If the 6.5 billion of DIP loans, which includes the roll-up, are paid for the U.S. and there's only 5.5 billion in value, that leaves a billion-dollar roll-up deficiency.

If, in fact, those roll-up loans, Your Honor, are deemed to have been repaid by virtue of the DIP structure, they would have no right to share in recoveries with respect to non-debtors. So the math would be as follows:

Assuming the collateral outside the United States is $3.5 billion, the 8.25 billion of remaining unrolled first lien good claims would share that for approximately a forty-two-cent recovery.

However, by virtue of the provisions in 10(e) of the financing order and in Article 13 of the amendment, which was filed at two o'clock yesterday morning, the roll-up lenders can add back their claims against the foreign debtors. So the math would work as follows:

Still 3.5 billion of value in Europe, but now assuming my one-billion-dollar deficiency -- just a hypothetical -- on the rolled-up loans, that 3.5 would be shared with 9.25 billion

for a thirty-eight-percent recovery.

ABN has a billion-four outstanding with respect to the first lien debt. So a differential of any magnitude, even that one, is certainly meaningful.

The testimony from the DIP agent was that it was the DIP agent's job to put into effect in the DIP documents what was required by the term sheet. But the term sheet never mentioned an involuntary springing claim dilution as I've described or any pre-petition credit agreement. Even the priming that was provided for in the term sheet related only to liens on debtors' assets, and that can be found at the term sheet and next to the interim order at Pages 10 to 11. There was no reference to priming liens on non-debtor assets and, again, Your Honor, we are not objecting to priming on debtors' assets -- being primed on debtors' assets.

The financing motion does not mention claims dilution or reallocation of claims or the amendment. It did not request any such relief. There is no legal or evidentiary basis that's been offered to support authorizing this relief pursuant to this motion under 364 and, in fact, 364 reflects and refers to lien priorities and lien priming.

The debtors have not cited any authority that would permit, or offered any evidence to support the need for this extraordinary relief, particularly, Your Honor, and this is very important, without any notice or opportunity to be heard

by the pre-petition secured lenders who might be affected by it.

The amendment was not filed until 2 a.m. yesterday. To our knowledge, and according to Mr. Dugan's testimony, it was still in draft at the time it was filed and during the hearing yesterday and has not been finalized. The testimony was that no drafts were shown to anyone other than the group of fourteen, the instructing group as it's been called, of DIP lenders, and ABN. Although it did see a draft as of 2:12, it has not seen one since.

The testimony was, also, that there are hundreds of affected pre-petition secured lenders which did not see this amendment before it was filed and we do not believe they even now have any reason to know about it or to look for it. It has not been posted as one would expect and as they would expect on the Interlinks website for the pre-petition credit.

Although no effective notice was given, no statutory basis offered for this request or relief, and there's no evidence in the record to support the need for the relief, the amendment itself now actually provides, in Article 7, that this Court is authorizing the amendment as a DIP document under Paragraph 6 (c) of the DIP financing order. It is unclear how that could occur under these circumstances.

As Mr. Huebner urged in his argument with respect to the Millennium indenture, pre-petition financing documents are

unassumable. Mr. Ellenberg essentially said the same thing. If that's the case, how can there be an amendment to an unassumable contract to be signed by forty of the debtors without notice of a hearing as a condition to its DIP financing?

In the last paragraph of his declaration, Mr. Dugan calls it "conjecture" that the rolled-up loans would be deemed refinanced. The extension of that proposition is that no one should worry that the claims -- about the claims dilution occurring, as I've described it. If he's right, it's hard to understand why Article 13, Paragraph E of the amendment which effects this claims dilution is necessary. It's also hard to understand why the DIP documents contain quite unusual exculpation and indemnity provisions in favor of the DIP term agent, should the Court later determine that pursuing this structure constitutes gross negligence or willful misconduct.

The debtors' response to ABN's objection is that the Court should ignore ABN for two reasons:

First, it's just an intercreditor dispute; it has nothing to do with the debtors or the financing motion. The fact that the debtors are asking the Court in mid-hearing to approve an amendment as a DIP document undermines that assertion. The amendment and certain provisions of the DIP order are designed to redistribute recoveries by order of this Court, and it's unclear how the debtors can assert that that

objection presents no issue for the Court to decide.

The debtors and the DIP term agent also say that ABN should be ignored because thirteen of the fourteen members of the instructing group are okay with this situation. Given the size of their roll-up loans, of course they're okay with diluting other lenders' claims to increase their recoveries if the rolled-up loans are deemed repaid. That position also ignores ABN's rights as a member of the instructing group to approve the DIP order and to approve the DIP credit agreement.

Your Honor, it's also the adult equivalent of the teenaged statement "everyone else is doing it." And the response to that is often -- the best response to that is: Just because everyone else is doing it doesn't make it right.

What's going on here with the pre-petition credit agreement amendment and similar embedded provisions in the DIP order isn't right. It isn't fair or reasonable, and there is no legal or evidentiary basis in this record for granting that relief. That's why ABN is simply urging Your Honor that the back-door, involuntary claims dilution provisions embedded in these documents be removed.

We respectfully submit that this Court, particularly given the total absence of notice, delete the offending provisions in Article 13 and in the DIP order before approving the DIP financing, and we've taken the liberty of marking the DIP order and the amendment to accomplish that end. We would

be happy to hand it up to the Court for review, to share our comments with other parties. There are very few changes required. And in fact, we have on prior drafts made the same request of the lenders, and our requests have gone unanswered.

THE COURT: My answer to that is the same as before. If you've already or you're about to give them a copy of what you want to hand up, you can hand it up. You can have one of your folks do that. But I want to make sure that I understand exactly what I am asked to do that gores your ox. As I understood it, there are two separate things:

One is giving Citibank and exculpation --

MR. HUEBNER: It's not --

MS. SCHONHOLTZ: It's not --

MR. HUEBNER: It's definitely not Citibank, Your Honor; it's UBS.

THE COURT: Oh, UBS.

MS. SCHONHOLTZ: It is --

THE COURT: All right.

MS. SCHONHOLTZ: Our objections, Your Honor, simply go to the term DIP facility, not to the ABL.

THE COURT: Okay. Term. The exculpation from any liability that there might ultimately be found to your guys, vis-a-vis any intercreditor issues.

And the second being asking me to approve the document that was circulated yesterday morning at 2?

MS. SCHONHOLTZ: The letter is, by far, the most important because it affects substantive rights of pre-petition lenders without notice, and actually without any record here to support it. That is the most important.

I point to the exculpation and the indemnity more to point that, although people say there's no risk of this claims dilution, obviously somebody thought there was enough of a risk of this situation occurring that he or she thought it was appropriate to protect the DIP term agent against that possibility.

THE COURT: All right. Do you think that's the case, or have you ever seen a facility where people didn't ask --

MS. SCHONHOLTZ: It's supposed --

THE COURT: -- the Judge to give them exculpation --

MS. SCHONHOLTZ: No, Your Honor --

THE COURT: -- in every imaginable way?

MS. SCHONHOLTZ: No, Your Honor, it's -- the termsheet contained a totally standard exculpation and indemnity. What our objection to is -- about this one is it says that, if this structure fails, they are indemnified, they are indemnified against gross negligence and willful misconduct. That is unusual, it is not customary, and the termsheet did not have indemnification if an agent acts with gross negligence and willful misconduct. That's standard, we know that, we have no issue with that. It is the specific provision that was put

into this one that says, if it does constitute gross negligence and willful misconduct, you're still going to indemnify them.

THE COURT: Uh-huh. Pause for a second.

MR. ELLENBERG: Your Honor, I haven't seen the documents counsel wanted to hand up, so perhaps --

THE COURT: Well, why don't you gather them up and circulate them now while I'm looking at --

MS. SCHONHOLTZ: The comments, Your Honor --

MR. HUEBNER: I mean, to be clear, no one has.

MS. SCHONHOLTZ: No, no, no, that's not accurate, Your Honor. These were comments that we made on the DIP order several days ago. We have them here again, and there are very few provisions. But the -- certainly, the lenders' counsel has seen a markup of the draft DIP order that covers these points, and with respect to the amendment, since we saw it at two o'clock this morning -- yesterday morning. Sorry, the days are all blending together. It just requires the excise of one provision, and Mr. Talmadge has them. May I approach, Your Honor?

THE COURT: Yes.

(Pause in proceedings.)

THE COURT: Okay.

MR. HUEBNER: Your Honor, I just want to be clear. This was clearly prepared before. We've all been here, and we were here yesterday. It would have been nice to see this very

beautiful book before five to 11 from the podium.

THE COURT: And no doubt Ms. Schonholtz is going to say that, on a matter of the importance of the document that was circulated at 2 yesterday, she would have related her analogous questions. And the issue I'm going to deal with Ms. Martin on when it's her turn is how it complies with the requirements of Bankruptcy Rule 4001(a) that requires all of the relevant documents associated with the financing to be submitted as part of the motion. Although, of course, it's customary for updated things to be provided thereafter, so long as it's consistent with due process.

I'm going to let Ms. Schonholtz finish and let you folks reply, and then I'm going to make a determination as to whether it can be resolved today or whether I need to have a continued hearing on this issue on Sunday.

MS. SCHONHOLTZ: Understood, Your Honor.

Just for the record, I think Mr. Huebner gives us too much credit. This was actually prepared late last night, after the hearing was over. And obviously, with respect to the DIP order comments, they've seen them already.

If I may, Your Honor, just with respect to the amendment, if I can turn your attention to Page 5 of what I handed up, which is at the back of the binder.

(Pause in proceedings.)

MS. SCHONHOLTZ: Paragraph (e) is what we would call

the offending paragraph that works --

UNIDENTIFIED: I'm sorry, Counsel. What are you referring to, please?

MS. SCHONHOLTZ: I'm referring to the amendment that ...

(Counsel confer.)

MS. SCHONHOLTZ: Okay. I apologize. If everybody has the amendment, this will take one second.

MR. ELLENBERG: Nobody has it.

MR. HUEBNER: Nobody has it.

MS. SCHONHOLTZ: Everybody has the -- nobody has the amendment?

THE COURT: Well, I think your point is, I have it in a supplemental document that was stuck in the back of the spiral. And do your opponents just have the spiral or do they have --

MR. HUEBNER: That's correct, Your Honor.

MS. SCHONHOLTZ: Right. Okay. Your Honor, just for the record, the document that was filed, "Notice of Filing of Draft Amendment No. 2," at two o'clock in the morning, our proposal with respect to that is just to strike Paragraph (e) on Page 5.

THE COURT: Uh-huh.

(Counsel confer.)

(Pause in proceedings.)

MS. SCHONHOLTZ: Should I continue, Your Honor?

THE COURT: I'm going to have to read it a couple more times to fully understand its import, but I'm going to let you to continue.

MS. SCHONHOLTZ: All right. And I'd be happy to answer any questions.

The binder that we just handed out -- and again, these comments had been provided previously with respect to the order -- it's on Page 34 of what Mr. Talmadge handed out, would be to delete the same language in Paragraph (e), because it's identical to what we just looked at in the amendment.

THE COURT: All right. So the red stuff on the foot of Page 34 is roughly consistent with what's in that Subparagraph (e) on the amendment?

MS. SCHONHOLTZ: I believe it's almost exactly the same, Your Honor, yes.

THE COURT: All right.

MS. SCHONHOLTZ: Now the rest of the changes, which are minor, contained in -- and we can look at them individually, but contained in Paragraph 13, on Page 36 of the markup; it's the blue language; Page 42, again the blue language; and Page 61, same language, is just designed to avoid a back-door way of preventing pre-petition lenders who may have a good claim against non-debtor assets from having to not receive them or turn them over to DIP lenders -- or roll-up

lenders. Sorry. That just basically avoids the same thing happening through the injunction provision and other provisions. And those would be the only changes we'd suggest, Your Honor.

THE COURT: And you're saying that the blue language has to be deleted to avoid --

MS. SCHONHOLTZ: That blue language -- sorry -- goes in.

THE COURT: Oh, has to go in --

MS. SCHONHOLTZ: Yes.

THE COURT: -- to protect you from dilution as a consequence of non-debtors paying off their assets?

MS. SCHONHOLTZ: Yes. The blue language goes in; otherwise, assuming that the pre-petition secured parties would get more of a non-diluted recovery in Europe, arguably certain provisions of this DIP order would require us, notwithstanding that we don't have to share on any other basis, to give it -- to not get paid until people above us are paid, and that's just to avoid that consequence. So the red comes out; the blue goes in.

MR. ELLENBERG: Your Honor -- Counsel, I see blue language on Page 24, is that included?

(Counsel confer.)

MS. SCHONHOLTZ: Yeah, no, that's -- we don't need to focus on that. That's not related to this issue and -- oh, I'm

sorry, I do apologize. Thank you.

Page 24 is designed so we don't have a recurrence, essentially, that the senior credit facility, which we're still not clear how it could be amended, could be amended without at least notice to all parties-in-interest. That's what we've done in the blue language on Pages 23 and 24. We don't want to find ourselves in this position again, Your Honor.

And if there are no questions --

THE COURT: Well, the finding yourself in that position isn't so much your fellow pre-petition lenders prejudicing your interest; it's asking me to bless your fellow pre-petition lenders adversely affecting your interest, right? You're not asking me to adjudicate your intercreditor issues, except insofar as I'm asked to bless them -- the prejudice to you by reason of judicial action in this court.

MS. SCHONHOLTZ: If I understand your question, our issue is we don't want this Court to bless the prejudice against the pre-petition secured lenders by the provisions I pointed out; that is the point. We are not asking you to adjudicate any intercreditor disputes. We just don't want to be prejudiced if, in fact, the pre-petition secured lenders have rights with respect to non-debtor collateral.

THE COURT: All right.

MR. WEISFELNER: Your Honor, may I inquire? A question from the perspective of the estate.

Counsel made reference to exculpatory provisions that are unusual, and on first glance, I was hoping she could point those out to the Court and the parties.

MS. SCHONHOLTZ: I would be happy to, if you give me one second.

(Counsel confer.)

MR. HUEBNER: Yeah, Your Honor, let me just -- this is other lenders indemnifying their agent; it's not the estate.

MS. SCHONHOLTZ: But it's also -- it's rolled-up lenders and DIP lenders.

THE COURT: All right. Well, if that's so, it would seemingly moot out Mr. Weisfelner's concerns, but I'm not sure if it would moot out Ms. Schonholtz's concerns.

MR. HUEBNER: I agree, Your Honor. I just wanted to --

MR. WEISFELNER: That's why I sat down.

THE COURT: Okay.

MR. WEISFELNER: Thank you.

MS. SCHONHOLTZ: Would you still like me to answer it or no, Your Honor?

THE COURT: I'm not sure if Mr. Weisfelner cares. He said he sat down. Maybe -- Mr. Weisfelner, do you continue to care?

MR. WEISFELNER: Your Honor, my concern was the obvious one, and that is that, if there's indemnity flowing to

an agent for conduct that exceeds the scope of the conduct that agents typically get indemnified for, I didn't want this estate potentially liable to an agent for lawsuits that other lenders may have, for the fact that there were amendments proposed without notice that affected their economic interests.

THE COURT: Of course, I understand. But it sounds like that issue is now moot.

MR. WEISFELNER: Based on the representation I just heard, yes.

MS. SCHONHOLTZ: With respect to the indemnification. With respect to the exculpatory provisions, which are 9.03 of the DIP credit agreement, the agent is being -- is being exculpated from the same consequences. The indemnification is by the lenders.

THE COURT: All right. Then I'll hear from Mr. Huebner or Ms. -- are you going to carry the ball for the -- for UBS --

MS. SCHONHOLTZ: Thank you, Your Honor.

MS. MARTIN: (Not identified) Your Honor, he has time constraints, so I was going to speak first. But recognizing that Mr. Huebner has to be out of here by 11:30, he's going to speak briefly.

THE COURT: All right.

MR. HUEBNER: Your Honor, I'm going to be very brief because this is really not our issue. But I think that there

are three things or two things that are very important for me to say at the outset.

Ms. Schonholtz was very direct with the Court, and her pleading is even more direct, on Page 4:

"These features were not contemplated by the DIP termsheet, are quite novel, and are inconsistent with the roll-up DIP loans."

In other words, her complaint is that things were done; and, in particular, she says the issuance of notes and the roll-up being documented under a new credit agreement, in part, that are inconsistent with the termsheet, and that's why they're very upset. All right. I think that's a fair characterization of the problem. The problem is that -- you know what? I'm not going to ask. That's my understanding of the problem --

(Laughter.)

MR. HUEBNER: -- which is that we did things that aren't in the termsheet. Well, there's just one problem with that: They are in the termsheet, totally, expressly, and directly.

And let me be very clear. Unfortunately, I don't know where it is in the exhibit set ...

(Counsel confer.)

THE COURT: Well, make sure she gets a copy of what you're giving me.

MR. HUEBNER: She has the term -- this is the termsheet.

(Counsel confer.)

MR. HUEBNER: So, Your Honor, let's first go to the section called "DIP Facilities," on Page 3. And the first paragraph says:

"What are the 'DIP facilities.' The DIP facilities are the new money facility and the roll-up facility."

Right? That's what they are. It's both of them, not just the new money.

And then we turn the page, and we look at the last sentence of the section called "DIP Facilities." And what does it say? It says:

"The facilities will be documented under separate credit agreements."

So this stunned surprise that the roll-up DIP facility is documented under a new credit agreement, which is grossly at variance with the termsheet, there is a reason they're the only lender that feels that, because it's wrong.

And now let's talk about promissory notes, because that's even more direct. Now we can turn to Page 29, which is the annex of customary closing documents, and we can go to Subsection (b):

"Execution and delivery by the debtors of this termsheet and promissory notes evidencing the loans

made and to be made under the facilities."

And what are "the facilities"? Well, we just covered that. The facilities are the facilities in the DIP Facilities section, which include the roll-up.

You know, I only rise on this point, not because I want to be adverse to Ms. Schonholtz or Ms. Ball, but because there is a reason thirteen lenders say that we did exactly what the termsheet contemplates. And again, it's right there in their pleading: Their view is that something radical happened because the roll-up loans are getting promissory notes and they're getting documented in a credit agreement. Unfortunately for Ms. Schonholtz, that's exactly what the termsheet says. That's number one.

The second point --

THE COURT: Well, is that the issue, or is the issue what the definitive documentation ultimately says?

MR. HUEBNER: No. The issue is that they are documented under a new credit agreement, and it should -- their concern is that, because this is being done as a new loan, it could be deemed new, and not the payoff of the old loan. And there is a series of risk and rewards about which way people think it's better to be done. Thirteen people decided the other way. But more importantly, that's what the termsheet said they were doing. So the fact that they don't like it is sort of interesting, but not relevant to this Court.

Now let's talk about the provisions that they're talking about. First of all, they say things like, "for the avoidance of doubt, it is the parties' intention." Nobody is asking you to make a finding, nobody is asking you to issue a ruling. I mean, look at the language that they're talking about.

This is in the amendment -- which, by the way, just to be very clear, the 2 a.m. was not last night at 2 in the morning; it was the night before at 2 in the morning, or whatever it was. So Ms. Schonholtz discussed these things with the Court yesterday with full knowledge of that amendment then. It was not something that they learned about in the last X hours by any stretch. And as you know, since they've been sending markups -- which, again, I personally am -- I don't think I've been involved in -- you know, this is not a new issue to anyone.

So the question is: Is the Court being asked to make a finding on these issues that is unreasonable or inappropriate? And I'm going to leave this largely to Ms. Martin. But if you look at the things that are striking, there are things like lenders indemnifying other lenders; whether lenders are voting for an amendment that she doesn't like. Well, that's fine. She can vote. And if she can get enough people to carry the day, the amendment won't pass. The debtors' activity in this amendment is ministerial. It's not a

material document from the estate's perspective because it's merely the effectuation of the roll-up.

And now let's talk law, right? The law --

THE COURT: Pause, please, because you made a potentially significant point.

(Laughter.)

MR. HUEBNER: Well, it took three days, but I'm glad that I could ...

(Laughter.)

MS. MARTIN: (Not identified) You're stealing my argument.

THE COURT: You're saying that the content of the amendment doesn't gore the ox of the estate or the unsecured creditor community or anybody other than the parties to the senior secured documentation as to which this is an amendment?

MR. HUEBNER: I have two words, Your Honor: Bing-O.

(Laughter.)

MR. HUEBNER: That's exactly right. The estate can speak to the amendment for themselves. We happen to need their John Hancock on amendments because that's the way the credit agreement is set. This effectuates the roll-up in a manner that I believe -- and I don't want to overspeak because it's not my side of the house, and we're getting outside my scope, and I'm getting, correctly, looks from Simpson Thacher like, what are you doing up there.

(Laughter.)

MR. HUEBNER: But --

MS. MARTIN: We don't disagree with Mr. Huebner. This is just the argument we were going to be making, so ...

(Laughter.)

MR. HUEBNER: Okay. So I should really stop soon. Let me just say one more bankruptcy law thing, and then Ms. Martin can answer your questions, and it sounds like very much to your satisfaction. Let me just talk bankruptcy law, because that is something that I think I'm hopefully occasionally competent to speak on.

THE COURT: All right. But before you go on to your next point, the question that I guess I'll ask Ms. Martin, since you won't be here anymore --

(Laughter.)

THE COURT: -- is: If it doesn't affect the interest of the estate and/or my unsecured creditor community, then why do I care about it and why do I need it? She can answer that, if you prefer not to.

MS. MARTIN: Well, Your Honor --

THE COURT: When it's her turn.

MS. MARTIN: Okay.

(Laughter.)

MR. HUEBNER: Your Honor, let me just hit the law for a minute. Ms. Schonholtz suggested to the Court that because

the pre-petition financing agreement is a financing agreement, it cannot be amended, and the lenders cannot enter into agreements or changes, particularly as amongst themselves, in connection with that agreement. I'm sure she's thought about this now for a couple of days, and you would have thought that there might have been a case cite or a statutory cite, and of course there are none, because I believe that there are none.

This is not unusual that agreements -- especially because there are agreements between the lenders in the document -- do remain for some purposes of living in a document; for example, if there are changes to indemnity. People sometimes move for stay relief, for example, to give notices that do affect the debtor under preexisting documents, like things that, you know, trigger potentially interest rate changes and the like. So I don't think it's right to say that the large number of pre-petition lenders can no longer do anything to a document that gives them rights and remedies, vis-a-vis one another; that they are frozen in time merely because under 365(c)(2) the debtor is no longer allowed as a matter of law to accept new extensions of credit under that document.

On the 4001 point, Your Honor, which is the last bankruptcy technological point that I will address before ceding the podium that I probably shouldn't have even risen to. I said it yesterday, and it's a very dangerous thing, so I'm

not ending in the way that I would like. It's a very dangerous thing to have a discussion with the Judge about why less notice is actually okay. That's not a position one ever wants to be in; and, in particular, I pride myself on being a huge advocate of time and notice and inter-activity.

But as it happens, what 4001 actually says is that:

> "A motion to attain credit in accordance with 9014 shall be accompanied by a copy of the credit agreement and a proposed form of order."

Not having the rule in front of me yesterday, I took the view, and I expressed my understanding of common practice, having done this for a while, that the main documents that impact the debtor are always to be filed, and should.

This pre-petition amendment is a great example of something --

THE COURT: You're saying it's not the credit agreement, but it is an amendment to the pre-petition secured debt documentation.

MR. HUEBNER: Correct. And that's why Mr. Weisfelner correctly stood up, but then also correctly sat down. Because if the amendment --

(Laughter.)

MR. HUEBNER: That was not a joke.

If the amendment had the effect of impacting the estate, and there were things in there that said, the debtor

hereby agrees to indemnify UBS for bad-faith, willful misconduct, that would be a very material document, and that would be the kind of thing that I think that the Court and parties absolutely should know, but have time to reflect.

But Ms. Martin will describe what that document actually is, and then the Court will decide whether it's in the category of the DIP credit agreement, or one of the many, many --

THE COURT: I understand that. But then, Ms. Martin, when it's your turn, the question I'm going to ask you is whether, if it is not strictly encompassed within 4001(a), but I'm nevertheless required to approve it in any way, whether you've got to give appropriate notice of whatever you're asking the Judge to approve. I'm not going to prejudge the answer to that question, but that's what I'm going to ask you when it's your turn.

MR. HUEBNER: Shall it be your turn now?

MS. MARTIN: It is my turn.

(Pause in proceedings.)

MS. MARTIN: Good morning, Your Honor. I think my danger in letting Mr. Huebner go first is that he's left me in a position of largely repeating some very, what I believe are effective and to-the-point arguments on this issue.

If you'd like me to deal first with this 4001 issue, the amendment is something that the debtors will need to sign.

It is --

THE COURT: Will need to sign?

MS. MARTIN: The debtors need to sign the amendment because they're a party to the pre-petition agreement. That's why we've taken the view, we would file it, but we don't view it as being material to the debtors. The only impact this amendment has is on non-debtors. There are non-debtors who are signatories to the pre-petition agreement, and therefore are signatories to the amendment. And the impact of the amendment is only on the non-debtors.

So, while the debtor has to sign, that is purely a ministerial act. And we've put this before Your Honor on the basis that you probably would want to see this if the debtors are signing it, perhaps sign off on it, but I don't know that there's been any issue of a loss of due process.

THE COURT: Well, okay. Then let me ask you the corollary of that or the follow-up question to that. If the only reason the debtors are asked -- are required to sign it is because they're a party to it, but if they are not affected by it in any material way, then is my more appropriate order to permit them to sign it without passing upon the document in any other way?

MS. MARTIN: That's exactly right, Your Honor. I don't think there's anything in this order that asks you to pass on the document. And I don't have the cites in front of

me, but we looked this up -- I don't think that anything in your entry of the DIP order would constitute res judicata or collateral estoppel on this issue.

The significant point with the amendment is it's not this Court who decides, with all due respect, Your Honor, whether or not that amendment is going to take place; it's the lenders who decide, the pre-petition lenders. So while ABN AMRO, as one of those pre-petition lenders, is unhappy with the impact this amendment may have on them, enough of the other lenders to that facility have indicated that they are willing to sign on to this amendment.

THE COURT: Do I correctly assume that the pre-petition senior secured debt documentation has provisions in it that dictate what kinds of affirmative votes are required in order to achieve an amendment approval?

MS. MARTIN: That's exactly right, Your Honor.

THE COURT: Some kind of percentage of some sort of another.

MS. MARTIN: Yes. As to this one, fifty-one percent of lenders holding -- I'm sorry -- lenders holding fifty-one percent of the outstanding debt.

THE COURT: All right. Continue.

MS. MARTIN: So the suggestion that has been made is that Your Honor entering the order that's been put before him is you're making an amendment to that pre-petition agreement,

and that is not the impact. The amendment takes place only when that fifty-one percent of lenders agree. So this is an intercreditor issue. ABN may not be happy with that result, but that's not something the Court is causing to happen; it's not something that the debtor is causing to happen. It's something that all the lenders to that facility have gotten together and have agreed will be the final result.

We also think that -- I just want to quickly correct a statement that was made about the factual record, which is that the testimony is that these various provisions were put in and the amendment was put in after certain advice came from ANO. Mr. Dugan's testimony was actually pretty clear on that, that he doesn't even recall the sequencing of it. So I think, while it's perhaps a minor point, I just want to make sure that that's clear on the record.

I don't know that I have much more. I do want to speak to several issues, though. One is that, let's just step back and recognize -- this really goes to the indemnity. UBS stepped in as an unwilling agent. There record is undisputed on that. This is an incredibly complex facility. It was one that, until the wee hours of negotiating after many days, people still weren't sure was even going to happen. I think it was called a "herculean effort," "miraculous" by Mr. Ellenberg.

Mr. Dugan's first meeting that he attended was on December 29th. Other UBS representatives attended earlier

meetings. But it wasn't until the wee hours of the morning -- I'm sure you remember, Your Honor, during the first-day hearings, which stretched into the 1 or 2 a.m. hour of the following morning, that UBS agreed to step up and be the agent. And that's because everyone else involved with this recognized how much work was going to be involved, how complicated this was going to be, and potentially how risky it would be to structure something that would make every party happy.

So the idea that there was an indemnity that would protect UBS in the tremendous job it has done, by the way, in brokering a consensus among what we had thought was fourteen, but now is at least thirteen of the fourteen lenders -- and there are sufficient numbers of the other thirteen who would step up to fill the gap that ABN AMRO is willing to fill.

I don't even understand the argument that the indemnity is over-reaching an inappropriate. And again --

THE COURT: Time out, because this is the -- I understood your first point. Because if the debtor is merely being authorized to sign something that's giving away ice in winter, it doesn't affect the debtor, and that could be argued to cause me to shrug my shoulders. But you're asking me, by the indemnity, to create substantive rights as between non-parties to the estate. And at least arguably that requires me to stick my nose in an area where I may not have jurisdiction.

MS. MARTIN: Your Honor --

THE COURT: You know, because -- I don't know -- I'm sure you've been getting no sleep and you've been busy on other things. But one of the things that I talked about in the preliminary injunction hearing on the wholly unrelated issues that took place earlier this week and which I issued the decision on yesterday was that I had related-to jurisdiction and other kinds of jurisdiction because it had -- that issue had an effect on the estate. Determining the matters of dispute between the various members of the senior secured pre-petition facility seems, at least at first glance, to have a lesser effect upon the estate.

Your Honor, the lenders who are being asked to indemnify UBS are the lenders participating in this DIP. This is not a reach-back to entities in the pre-petition secured facility, asking all of those lenders to indemnify UBS for what it has done in connection with this DIP.

THE COURT: So if -- excuse me. So if ABN AMRO chooses not to participate in the DIP, they're not on the hook for the indemnification?

MS. MARTIN: That's right, Your Honor.

THE COURT: Okay. Continue.

MS. MARTIN: So that's exactly my point. This is something that thirteen -- and this is in our brief, as well -- thirteen of the fourteen have agreed to sign on to. It is a -- one of these material conditions, perhaps probably more

material to UBS than others. But as Mr. Ellenberg said, this is a tenuous agreement. There are pieces that have been balanced against each other; one person gives something, but they take something else. And to sit there and take out any one provision could be disastrous for this facility.

And as far as UBS is concerned, you know, if we step back, there were -- and this, again, was in our -- I'm sorry -- is in Mr. Dugan's declaration. There were other structures that were considered. There were -- even before the termsheet was entered, there was a structure that was considered that was, I think, very comparable to what ABN would like to see happen right now.

But many lenders -- and this is not just UBS's doing. In fact, Mr. Dugan gave testimony yesterday that they have taken the lead as the administrative agent. That does not mean that these are UBS's terms in this document. This is heavily negotiated between the lenders themselves. It represents input from all fourteen lenders. It's compromises, not just with the debtors, not just with the committee, but it's compromises between and among the lenders to come up with something that all fourteen thought worked.

And once the termsheet was agreed to, it's coming up with compromises to draft a final credit agreement that all thirteen -- and I actually would probably all fourteen -- agree is consistent with the termsheet. I don't even think ABN AMRO

and Mr. Huebner pointed you to provisions in the termsheet and the specific areas that ABN AMRO is complaining about.

But what ABN AMRO is complaining about is not any inconsistency with the termsheet; and indeed, this structure is entirely consistent with the termsheet. They're complaining about provisions that are beyond that. But as we've just talked about, the particular concern they have, this amendment, is something that's going to be agreed to by the lenders; the sufficient lenders, the pre-petition facility. If they weren't willing to agree to it, it wouldn't be happening, but that's why it's going to take place.

So from UBS's perspective, Your Honor, if this indemnification provisions wasn't there; if thirteen hadn't agreed to do it, if thirteen were putting UBS in the position of saying, look, we've all come up with a structure now that we think works and makes sense, but, UBS, you're the one that's going to be on the hook if it doesn't work and doesn't make sense, that just would not work for UBS; and it frankly wouldn't be appropriate, particularly here, given the extensive involvement of every lender. So it's not --

THE COURT: I understand that. But let me repeat something that I think you answered, but because it's so important.

MS. MARTIN: Sure.

THE COURT: What you are asking me to approve does not

in any way, shape, or form subject ABN AMRO to the risk of writing out a check to indemnify you.

MS. MARTIN: That's right, Your Honor.

(Counsel confer.)

MS. MARTIN: Oh, I'm sorry. Hold on one second, Your Honor.

(Counsel confer.)

MS. MARTIN: Yeah. I think I'm correct on that, Your Honor, and if I take a quick break, I can consult on that. I think the concern of ABN AMRO is that, because they've already lent under this facility, they're on the hook, Your Honor. They've lent under the interim facility. They're indicating that they want to be taken out of the facility. They're not -- I'm sorry -- they're not participating in the final facility that's being entered. So I don't think that this binds ABN AMRO.

THE COURT: All right. Continue.

MS. MARTIN: I don't know if Your Honor has further questions on the ABN AMRO issue. I think I've really made the points that I wanted to make with respect to ABN AMRO. So unless you have further questions, I'm just going to briefly address one or two points with respect to maturity and the BONY issue.

THE COURT: Sure.

MS. MARTIN: You know, again, this is the risk of

perhaps speaking last, so I think even these brief points that I wanted to make were covered --

THE COURT: That's okay.

MS. MARTIN: -- by Mr. Ellenberg today.

But with respect to maturity, I want to make sure there's just no ambiguity about why this has not changed off the original December 15th date or, you know, the eleven months and change that we've got.

You know, Mr. Weisfelner yesterday tried to argue in advance the position of the lenders about why it couldn't be changed and any -- he conjectured that what you would hear that it's an administrative impossibility at this time; that calling together the creditors' committees at this point could never take place in the time allowed, and I would expect there are tremendous administrative difficulties there. But like Mr. Huebner, I like to focus on the evidence that's actually been introduced.

And Mr. Dugan has described this issue as not one of practical impossibility in going back to the creditors' committees -- and I noticed his testimony on this point was included in the packet that Mr. Huebner pulled together -- but it's an issue about getting all of the lenders to agree to a change -- to change a provision that is and always has been a material term.

By the time Mr. Dugan focused on this issue -- and the

testimony is his first meeting was December 29 -- this was an apparently agreed provision. You know, most certainly, sometime between that date and when we had the first-day hearings on January 7th, everybody went to their credit committees for approval of that term. That's a material term; it's a material term to UBS, it's a material term to other lenders. That is the term that was presented to everyone for approval.

And for all of the reasons that Mr. Dugan laid out and Mr. Jaffe laid out, that term is significant with this facility and in these markets. This is a risky facility. This is one that almost didn't come together. We have a very complicated and very large loan, and the lenders feel protected having a shorter maturity date. And that is something that, without having, they would not have entered into this facility. Not only do they all go to their credit committees to get approval based on that term, but when they stood up here in your court -- and I think it was on January 7th, though maybe it bled into the next day -- when they made their commitments here, that was the term that was in the termsheet.

So the difficulty in going back to credit committees is not one of just asking everybody to meet in the central conference room and take a vote, can we change it; it's getting them to agree that one of the foundational points that will reduce the risk they're taking on with this agreement now be

changed, be taken out of the agreement. The impossibility is not one of practicalities; it's one of materiality. And you cannot, at this late date, affect a very tenuous, risky agreement, by changing what is one of the most significant provisions in that agreement.

You know, I also -- Mr. Huebner made another note I'll make just very quickly about the evidence Mr. Weisfelner tried to put in about this trading below par. And I'm not going to -- again, I'd be doing the same thing. But I think if there had been evidence put in and it was put in on the last couple of weeks, we would see this is not a new phenomenon, this trading below par.

You know, and then I think -- the other issue that, you know, perhaps is a little bit confusing is -- and I've addressed it, but just to make the point -- that the committee has put a lot of emphasis on the testimony of Mr. Dugan as to his understanding of how the December 15th date got into the agreement. You know, I think the testimony that he understood this came from Access. But they have completely ignored his testimony, which I just talked about, about why it stayed in the agreement. It didn't stay in the agreement because it was a relic that people just didn't choose to revisit; it stayed in the agreement because of the significance of having a date that was relatively short and would most ensure that these lenders get repaid.

I think, real quickly, on Bank of New York, I'll make a point that I think has been made by Mr. Huebner and Mr. Ellenberg both, but it's important, so that's why I'll repeat it. The roll-up is not adequate protection for the senior secured lenders.

You know, I think, Your Honor, the gallery here has been largely quiet. They've laughed at all the appropriate jokes, but they've otherwise been quiet and attentive to these proceedings. I think we all heard the collective gasp of incredulity from the gallery when Mr. Siegel suggested or stated outright during his closing that the roll-up is a form of adequate protection for the senior secured lenders.

THE COURT: Pause, please, Ms. Martin.

If I'm going to be reluctant to rely even on counsel putting forth facts to tell me things, when they haven't been sworn, I -- I don't think it's helpful to talk about the reaction of everybody in the gallery. Make your next point, please.

MS. MARTIN: Well, the point I want to make is that that's consistent with the evidence. The roll-up has always been compensation provided to the lenders for providing new money to the company. You know, we've heard there was no DIP at all until the logjam was broken by this agreement that there would be this dollar-for-dollar roll-up of new money and roll-up loans.

Mr. Dugan testified yesterday that there would be no DIP without the roll-up. I think it was Mr. Bigman, and it may have been one of the other company representatives who has given the same testimony. And Your Honor, I'll even agree with ABN AMRO's objection on their description of this issue. You know, if you look at Paragraph 6 of their objection, they state:

> "The right to roll up senior facility pre-petition secured loans was intended to be consideration for pre-petition lenders which agreed to provide new money DIP loans."

This is not adequate protection, and I think the point just bears emphasizing.

And finally, again, I think Mr. Ellenberg dealt with this this morning, but with respect to Bank of New York's suggestion that there's no practical reason why they shouldn't be allowed to participate in the roll-up -- and by the way, I don't think we've heard anything about BNY's willingness to participate in the new money part of the facility.

But Mr. Siegel's opinion that this would be doable and, you know, maybe take a little work on the documents, but not really be so impossible, really fails to reflect the practical issues involved. And I don't think I need to say it more than the company has already said it: It just can't happen. He pointed out there would be security law issues for

the company.

(Counsel confer.)

MS. MARTIN: Yes. Mr. Huebner noted yesterday, these are public bondholders, and there's no credit agent who's going to act for public bondholders. So if this were to have happened, it would have had to have been an entirely different facility. They just can't be worked into the current one.

Your Honor, I have no other points, unless you have some further questions for me on these issues.

MS. SCHONHOLTZ: May I briefly address the Court?

THE COURT: Yes, Ms. Schonholtz.

MR. ELLENBERG: Do I get a chance to speak, Your Honor.

THE COURT: Yes. But what's the most sensible order for me to take you folks, guys.

MR. ELLENBERG: Well, I'm responding to her points, so ...

MS. SCHONHOLTZ: Whatever you prefer, Your Honor.

THE COURT: You're going to respond to whatever Ms. Schonholtz says?

MR. ELLENBERG: I'm responding to what she's already said, Your Honor.

THE COURT: Well, why don't you --

MR. ELLENBERG: Do you want me to go last?

THE COURT: -- let Ms. Schonholtz speak, and then if

she says anything else you feel like you want to respond to, you can deal with both.

MR. ELLENBERG: Okay.

(Pause in proceedings.)

MS. SCHONHOLTZ: Thank you, Your Honor. Very briefly.

Ms. Martin says that this Court is not being asked to approve the amendment and the corresponding provisions in the DIP financing order. But in fact, if you just look at the amendment, Article 7 on Page 7 says in Section A:

"If this amendment is being executed in connection with Section 6(c) of the orders," which would give it authorization.

And B:

"This amendment is a DIP document, as such term is defined in the orders."

So --

THE COURT: Time out. Where is that, Ms. Schonholtz?

MS. SCHONHOLTZ: The amendment, Your Honor.

THE COURT: Yeah, that's this, right?

MS. SCHONHOLTZ: Yes. Amendment No. 2, and Waiver to Credit Agreement, Simpson Thacher, Draft 2/25/09.

(Pause in proceedings.)

THE COURT: Yeah. All right. Now Page 7. Section which one?

MS. SCHONHOLTZ: 7.

THE COURT: Oh, I see it. All right.

MS. SCHONHOLTZ: So I think, Your Honor, Ms. Martin may be incorrect that you're not being authorized to approve anything.

In addition, forty debtors have to sign this document --

THE COURT: Can I deal with that by -- if I otherwise am satisfied that it doesn't raise a matter of material concern from the estate's perspective, simply say so?

MS. SCHONHOLTZ: You can, Your Honor, as long as it's not given any effect for another reason, by order of this Court today, for another reason --

THE COURT: No, I'm talking mainly about saying what I'm not ruling on, rather than adding things that I am ruling on.

MS. SCHONHOLTZ: Okay. That would be maybe one way to accommodate it, Your Honor.

Although I would point out that a similar provision that we're objecting to is in the DIP financing order, so we just have to be mindful it's in both places. Forty debtors have to sign this thing, Your Honor, and it is a closing condition to the DIP financing. So it's not as if it's a stray document that has nothing to do with what you are being asked to rule on today.

THE COURT: You mean getting the requisite affirmative

vote of the pre-petition secured senior facility is a condition to the debtors getting their money?

MS. SCHONHOLTZ: Your Honor, yes, although I believe they changed it last night to say that a certain amount of the new money lenders and roll-up lenders. But the delivery of this amendment, with, I presume, the understanding that it has some effect, is a closing condition to this DIP.

THE COURT: You mean this estate is being held hostage to you pre-petition lenders making your own private deal?

MS. SCHONHOLTZ: We don't -- we are not trying to make a private deal; we are just not wanting to be prejudiced by an amendment that arguably requires a hundred percent vote that's being asked to be blessed by something less indirectly through this Court, without notice. That is all.

Ms. Martin said that enough lenders have approved this amendment to have okayed it. Well, apparently, according to the testimony yesterday, there are 600 or some number of hundred pre-petition lenders. So the fact that thirteen have blessed it, that may pass it or not under a required lender standard, but there is an argument it's a hundred percent issue as to whether this can go into effect under the DIP -- under, sorry, the pre-petition credit agreement.

Again, we are not asking you to do anything with this; we want this issue to be set aside for another day on proper notice in the appropriate forum. It is the debtors and the

thirteen lenders who are putting this before you.

The debtors have not directly asked for this relief. They haven't establish that anyone is entitled to have claims dilution against another creditor, and there's no evidence in the record at all that this is necessary. And so, again, if it's not going to happen, and if it's not that necessary, we would ask that it be stricken from this order, and just that provision of this amendment be stricken.

I also believe that Ms. Martin may have been incorrect. ABN -- in her first iteration, to be fair. ABN is on the hook, if you will, with the expanded indemnities. It is a DIP lender. It has funded two-thirds of its committed amount following the interim. And whether we remain party to this agreement, whether somebody actually shows up with more than words to take us out remains to be seen, Your Honor; in part, with respect to what happens here today. So we're a DIP lender, we're bound, we have a lot of money in this -- in this estate already on a post-petition basis, as well as a pre-petition basis. Thank you, Your Honor.

THE COURT: All right. What do we have now? Mr. Weisfelner and -- oh, forgive me. Mr. Ellenberg.

MR. ELLENBERG: Thank you, Your Honor.

Let's talk about two things that ABN has not mentioned, either in their papers or today: They haven't mentioned 364, they haven't mentioned _Farmland_. I continue to

believe, Your Honor, this is an intercreditor dispute that has nothing to do with the issues before this Court.

THE COURT: Oh, I agree with you in the sense of my approving or disapproving the DIP as a concept, Mr. Ellenberg. But the problem, as I have been understanding it for the last hour or so, is what kind of provisions I appropriately can or should put into the orders that I enter, associated with approval of the DIP, if I approve it.

MR. ELLENBERG: Well, let's talk about that, Your Honor. Counsel just said that in the amendment, it says that it is being approved pursuant to Section 6(c) of the order, and that it will be a DIP document for purposes of the order. Let's look at what Section 6(c) actually says, Your Honor. It's on Page 22 of the binder.

(Pause in proceedings.)

THE COURT: You're talking about the underlying --

MR. ELLENBERG: I'm talking about the order, Your Honor.

THE COURT: Oh, the order. Page 22 of the order?

MR. ELLENBERG: Yes. You'll see the (c) there, and that's 6(c), which is the cross-reference from the agreement. This is the only thing this Court is being asked to do with respect to this document, and this is nothing but an authorization-to-sign provision.

"In furtherance of the foregoing, and without further

approval of this Court, each debtor was, by the interim order, and hereby is authorized and directed to perform all tasks to make, execute, and deliver all instruments and documents."

That's all this is, Your Honor.

And then (c)(1) says:

"The execution, delivery, and performance of the DIP documents."

Okay. So we are being authorized to sign this amendment, period, end of story; that's all Your Honor is being asked to do, authorize us to sign it. You are not passing on its contents, you are not approving any of the concepts, you are saying nothing about any intercreditor issue that is implicated by that document.

Now, Your Honor, let's look at the language that counsel wanted to remove. It's on Page 34. As Mr. Huebner says, the deletion starts, "For the avoidance of doubt." This is chicken soup. All right? It is not operative; it is merely interpretive.

THE COURT: Well, you can understand whether, if it's chicken soup, I might be of a mind to go on a diet --

(Laughter.)

THE COURT: -- and simply leave it out. I mean, "for the avoidance of doubt" suggests analytically --

MR. ELLENBERG: Okay.

THE COURT: -- that that's already the import of the existing documents, which I assume is what you meant by "chicken soup."

MR. ELLENBERG: That's correct, Your Honor, and --

THE COURT: And if I don't feel like taking a side in that dispute -- and you can sense from the many questions I'm asking, I am not inclined to take a side in the dispute, subject to any further rights to be heard -- then the question I've got to ask myself is: Why should I say it, in what, in essence, is an order coming out of my mouth?

MR. ELLENBERG: Well, Your Honor, what comes before, which is part of 6(c), has not been objected to. All right? And it says:

"Nothing contained herein shall affect the obligations of non-debtor affiliates of the debtors with respect to any guarantees provided by such non-debtor affiliates under senior pre-petition loan documents or with respect to the senior facility pre-petition security interest."

Nobody objects to that language; it's perfectly appropriate language. All it's saying is, you're not affecting anything having to do with the obligations of non-debtors. Everyone agrees with that.

Again, the rest of this is interpretive. Why the lenders want this in here, Your Honor, it's not our request, we

didn't ask to have it put in there. The lenders have asked to put it in there. For whatever reason, it makes them feel more comfortable. But the point is what she is asking to be removed is something that starts "for the avoidance of doubt."

What is taking sides, and what is much more problematic, is what counsel is asking to be inserted; the comments -- the insertions do try to prejudge the intercreditor dispute, and that's a problem, I would think. I don't know what business the Court would have making those insertions.

Let me be clear, Your Honor. From the day we agreed to this roll-up, we have made clear that the intercreditor issues resulting from this roll-up -- and there are many, going way beyond the one ABN has pointed out -- are not the business of this Court. There was an original request to have the Court approve the roll-up, make findings about whether it's in compliance with the indenture or not in compliance with the indenture. We refused all of that. It is not properly within the province of this Court because it has nothing to do with the debtor; it is solely intercreditor. We've worked very hard to keep those issues out of this case and out of this order. The additions that are requested here do exactly the opposite.

So again, Your Honor, I don't care if the language on Page 34 is deleted or not, except that I need the lenders to lend. And if this is what they need to lend, then I need it. But I must say, it starts with "for the avoidance of doubt."

Thank you, Your Honor.

MS. SCHONHOLTZ: I'm going to take care of one of your problems, if I may. The intention was not to prejudge intercreditor disputes with that language. We'd be fine if the order said "without prejudice to all rights with respect to those issues later." So we're not aiming to have you decide any intercreditor dispute.

And Mr. Ellenberg did not point the Court to Section 7(b) of an amendment that says the amendment is a DIP document. And if you look at Page 3 of the binder we gave you, Your Honor, where DIP documents are defined, that's the important one.

> "Authorization for the Debtors. Debtors are being authorized to execute and deliver all final documentation and to perform such other and further acts."

So it is being blessed as a DIP document under 7(b). Thank you, Your Honor.

THE COURT: All right. Let's get back to the rights I gave Mr. Weisfelner and Mr. Siegel to speak further.

MR. WEISFELNER: Your Honor, I'd like the ability to speak last. If we're going to go through all these different parochial squabbles, I want to be able to represent the interests of all of the general unsecured creditors in one focused position.

THE COURT: I guess I don't care. Mr. Siegel, come on up.

I did tell you, Mr. Weisfelner, that if you say anything even as you put it last, I'm going to give your opponents a chance for surrebuttal.

Go ahead, Mr. Siegel.

MR. SIEGEL: Your Honor, I won't be long.

THE COURT: Please don't make it long.

MR. SIEGEL: Basically, I just want to take us back to what exactly it is the Bank of New York is asking for and what we think is going on. This is actually a very straightforward request. There is $475 million of debt that was secured as a result of the equal and ratable provisions in those bonds as part of the 2007 transaction. As a consequence of that, those unsecured bonds became subject to $12.2 billion worth of debt that was placed alongside of it. Those bonds had a right to seek marshaling on the day of the filing of the petition.

Based upon the debtors' numbers, if marshaling was effectuated, those bonds would be paid in full, and there would be a substantial excess available to make sure that they were paid in full, even if there was a decline in value of the Lyondell assets. That's where we were on the day of the filing.

What the statute says is we're entitled to be adequately protected for how that position is changed. So what

happens? What happens is there is a DIP facility placed on the -- as my partner puts it -- the Lyondell empire. And what we say in Mr. NaJane's affidavit is absent any adequate protection at all, this is what has happened to our position. Then we say, how should the Court protect us for that position.

When Mr. Ellenberg says, we want to have it both ways, unfortunately, we know we can't it both ways. So what they are identifying as us wanting to have both ways is us dealing with the practical realities of the motion before this Court. Whether we think there should have been a separate DIP done or not is irrelevant. There was not a separate DIP done. We can't unscramble that egg. What we are asking you to do, Your Honor, is to give us adequate protection for that change in interest which includes that scrambled egg. That's what's going on here.

So what we say is the way they have done this is they have taken this position that we have and they have taken us and they have given us a claim to the community of assets of the empire. Well, the community of assets of the empire also have very substantial borrowing needs. The debtor has attempted to explain what the borrowing needs of the entity are. Frankly, Your Honor, I am very confused by all the debtors' explanations. I think I heard Mr. Huebner yesterday and Mr. Ellenberg yesterday saying that some of that DIP draw-down was attributable to the refinancing of the asset-based

lending. I think Your Honor pointed out that maybe some of it was going out to foreign entities. I don't think we have any good evidence as to what the actual borrowing needs of LCC and Equistar are. Excuse me. So we're uncertain about that.

But I do think that what we're seeing is we're not seeing a lot of cash flow going out -- I'm sorry, cash flow coming in when we look at that line of the equation on the five weeks, at least. The rest of that thirteen-week is speculative.

So all we are saying to you, Your Honor, and adequate protection, as I'm sure Your Honor knows, comes from the Fifth Amendment of the Constitution for taking. Something is being taken; we need to get something back. We're saying we need to be treated fairly for that.

Only one other point, and then I'll sit down. That point is about the roll-up. The roll-up is a very confusing issue. The reason it's such a confusing issue is it comes in three stages. There is the initial roll-up. The initial roll-up is a provision in the original lending by the original lenders who said they wouldn't do the lending without the roll-up. That is not adequate protection.

Then there is the second stage, the stage when Access was kicked out and the new lenders came in. And those people committed, and they asked for a roll-up. That is also not adequate protection. But then what did they do? Then they

said, in addition to that, we will give senior lenders who want to the right to buy into the DIP and thereby get the roll-up. That was what the adequate protection is.

Thank you, Your Honor.

THE COURT: All right. Mr. Rosenbloom?

MR. ROSENBLOOM: I thank you, Your Honor. Lewis Rosenbloom, Dewey & LeBoeuf, on behalf of Law Debenture as successor trustee. I appreciate the Court's indulgence. And I will need the Court's admonishment to be brief. That said, I'd like to think, at least with respect to matters of brevity, my record here is unassailable.

THE COURT: Compared to your colleagues, without a doubt.

(Laughter.)

MR. ROSENBLOOM: That said, Your Honor, I wasn't quite sure how to take Mr. Huebner's remarks. Would seem to suggest that I was a master of manipulation. But when Mr. Ellenberg stood up and described me as a weasel, I decided Mr. Huebner's remarks would be taken as a compliment. I wish he were here.

(Laughter.)

MR. ROSENBLOOM: Let me try it one last time.

Yesterday, I said that there are two operative provisions. These estates have not been substantively consolidated, and we are not seeking to enforce the indenture against the debtors. We are seeking to enforce it against the

lenders.

What the Millennium debtors have granted to the lenders is described as a limited guarantee capped at fifteen percent as set forth in the indenture of consolidated total net worth, or net asset value. So it is our position first that adequate protection in whatever form with respect to the pre-petition loans must be intended to protect that limited guarantee which is the only right the pre-petition lenders have under the pre-petition loan documents against the Millennium debtors.

By way of example, if the amount of the guaranty, which is fixed under the indenture, arose, the difference between the original amount and its eroded value can be provided in the form of adequate protection. The pre-petition lenders are obliged to live with the terms of the indenture which were entered into prior to the execution and delivery of the pre-petition notes, and by the express terms and condition of those loan agreements was accepted and adopted as binding on the pre-petition lenders.

Next, with respect to the roll-up loan, as Mr. Siegel said, it's very complicated. I'm not sure I completely understand it. It does have multiple components. If it's not adequate protection for the pre-petition loans, then our argument that they're capped by the pre-petition interest, the limited guaranty, that would fall.

It does have a maturity over one year, so maybe it's funded debt as provided under the indenture, or, as it's been described, it's really akin to a DIP facility in which case our final point, and I think the creditors' committee has made the point, Bank of New York has made the point; each separate debtor unless and until substantive consolidation is mandated by this Court, each separate debtor can only be subjected to liability for the benefit derived by that separate debtor's estate. So whether it's the DIP loan or the roll-over loan, the Millennium debtor estate should only be subjected to claims equal to the value provided to those estates. If the Millennium debtors are net borrowers, then clearly the lenders, the DIP lenders are entitled to whatever rights and interests have been granted to them. But if the Millennium debtors are net contributors, as we believe they've been, not net borrowers, then their estate should not be subjected to the billions of dollars of debt both in the form of rollover and in the form of new money DIP simply because they're affiliates.

Your Honor, we will leave to the Court's review and good judgment the indenture and the various loan agreements which are made expressly subject to that indenture to determine which of these master manipulators is right. I believe, Your Honor, that any result other than I have suggested is not only illegal, it borders on, as Mr. Siegel said, an unconstitutional taking of our estate's property and, therefore, is harsh, is

oppressive, and is punitive.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Weisfelner?

MR. WEISFELNER: Thank you, Your Honor. Again, for the record, Edward Weisfelner of Brown Rudnick for the Official Committee of Unsecured Creditors.

As I think Your Honor may have been able to discern from our arguments, our issues are narrow and primarily revolve around the maturity and the milestones. And, Your Honor, I don't know if Mr. Dugan is still in the courtroom, but if he is, he can't be getting paid enough from his institution.

(Laughter.)

THE COURT: Given the compensation in that community, I suspect he nevertheless is.

(Laughter.)

MR. WEISFELNER: I don't know if that's pre or post-bonus.

My point is this: You had his counsel, and perhaps more importantly you had debtors' counsel, try and tell you that you can't rely on Dugan's testimony because he missed the first two days of the marathon meetings. And I think what Mr. Ellenberg said was that he thought that maybe the guy was, quote, "cloudy."

Here's what Dugan said in response to the question of,

why is there a December 15, 2009 maturity date. The answer: Because that was in the initial request from Access.

Now, if you go on to take a look at the Jaffe evidence, remember this is the guy that bam, bam, bam, hit it out of the park on the issue of maturity. Maybe I added one "bam" too many. Maybe it was just bam, bam, he hit it out of the park.

Well, here's Jaffe, the guy that we were afraid to call on the whole issue of maturity:

"Question --" and this is from Page 27 of his deposition, which is in the record:

"Question: I want to talk about --"

THE COURT: Give me a second, please.

MR. WEISFELNER: Certainly.

THE COURT: Go ahead.

MR. WEISFELNER: "Question --" and I'm starting on Line 15 -- "I want to talk about where the 12/15 date came from. Who specifically, for example, proposed December 15th, '09 as the maturity date?

"Answer: I don't know."

On Page 30, starting on Line 18, the question is:

"And so what was the genesis of the one-year proposal?

"Answer: The genesis was we thought it was a market term. We also had very little long-term visibility into the company."

Your Honor, on Page 39 --

MS. MARTIN: Your Honor, I'm not -- I really hesitate to interrupt, but I just note that the committee did not do designations from Mr. Dugan's deposition.

MR. WEISFELNER: Of course we did.

MR. DOLAN: Quite to the contrary, Your Honor.

MR. WEISFELNER: You haven't seen this document before?

THE COURT: I --

MS. MARTIN: Your Honor, I won't fight about it. It was attached an exhibit. We fought about whether those were depositions to attach as an exhibit, but I don't want to interrupt his argument. I'm sorry, Your Honor.

THE COURT: I could swear that as part of my pretrial review I did review committee designations, and I thought we were going to take the entirety of this under Rule 32, anyway.

MR. WEISFELNER: And, Your Honor, I apologize for addressing counsel. It just -- it was a little disconcerting to be told that we didn't file a document that I was reading from.

MR. FRIEDMAN: Your Honor, it's Mr. Friedman. The -- Mr. Weisfelner's firm did designate yesterday by agreement Mr. Dugan's -- I'm sorry, Mr. Jaffe's deposition testimony.

THE COURT: Wasn't there even a piece of paper I saw that was called, "Designations"?

MR. FRIEDMAN: Originally, Your Honor, our firm designated deposition testimony, and then yesterday, by agreement, the committee did as well.

THE COURT: All right. The substantive issue, then, is behind us. I am going to ask that we try to maintain the decorum that I kind of like to have in this courtroom and that we not turn on each other, and that comments be addressed solely to me.

Go on, Mr. Weisfelner.

MR. WEISFELNER: And, Your Honor, for that I apologize to the Court and to Ms. Martin.

I'm on Page 36, and I won't be much longer in terms of running through these quotes. I just think they're critically important for Your Honor to be able to discern from the record and not from what I characterize as Mr. Huebner's testimony, but from the record what Mr. Jaffe, who we were afraid to call to the stand because he boom, boom, boom, hit it out of the park.

Question, Page 36, Line 19:

"Did any of the lenders, to the best of your knowledge, ever express to the debtors that a one-year maturity date was necessary to ensure that they would be repaid?

"Answer: I don't believe so, no."

Page 37, Line 8:

"Did the debtors ever broach to the lenders a

mechanism or framework by which the maturity date could be extended?

"Answer: I do not believe so."

Almost done. Two more references.

You know, according to Mr. Huebner, Mr. Jaffe is an expert in the area of DIP financing. I don't know where he got that from other than his own head. It may be true, but it's not part of the record.

In fact, on Page 39, when Mr. Jaffe was asked in connection with his reference that he thought that the term was "market," Line 20:

"And you say, quote, 'it was a market term.' Can you tell me in -- first of all, what did you mean by that?

"Answer: I think that in today's credit environment, you know, DIP tenures and maturities are shortened from where they were four or five years ago, particularly after the bankruptcy law changed, and we felt that that was a reasonable market term.

"Question: So have you seen any other one-year maturity dates in the DIP?

"Answer: I don't have any off the top of my head."

And then, finally, Your Honor, question beginning on Page 42 from my partner to Mr. Jaffe:

"I don't want to put too fine a point on the one-year maturity date. I want to again follow up on that. I

understand your testimony to be that in your experience you don't recall seeing another facility with a one-year maturity date. Is that correct?

"Answer: No. I said I can't name one off the top of my head."

Now --

THE COURT: Hang on, Mr. Weisfelner. The pagination on my copy seems to be different than from what you're reading from. What was the page that your transcript showed?

MR. WEISFELNER: On the last citation, Your Honor?

THE COURT: Yes.

MR. WEISFELNER: It began at Page 42, Line 21 --

THE COURT: All right. I --

MR. WEISFELNER: -- and ran through Page 43, Line 4.

THE COURT: All right. I think I found it in a different place on mine.

MR. MOSKOWITZ: Your Honor, I can clarify that after. It's -- you may be looking at the rough transcript as opposed --

THE COURT: Yeah.

MR. MOSKOWITZ: Okay.

THE COURT: Are there any material differences between the rough and final? Because I don't have a final that I'm aware of.

MR. WEISFELNER: Your Honor, I can represent that

there are not.

MR. MOSKOWITZ: I agree, Your Honor. This is Elliot Moskowitz from Davis Polk for Citibank.

THE COURT: Okay.

MR. WEISFELNER: Your Honor, again, I want to focus on the maturity date. And I must tell you that, you know, we still, sitting here today, have difficulty balancing the two different lines of testimony that we've generally heard. And I think they're both in the record.

From the company, we understand that maturity was a critical issue and that there was continuous push-back on that and every other term. From the agents' testimony, we're told that it was locked in early, regardless of whether it was an Access term or not, but it was locked in early to the point where because Dugan missed the first two meetings, he had no basis to understand what the predicate was for December 15th. But you know what? By the time he got to the meetings, before year-end, and certainly by the time he was selected as agent, sometime during the evening of the interim facility, he was there for every single meeting. And what he told us was the date was there, it was a material term, it was part of the term sheet, and he can't recall the debtor ever pushing back on it. And that troubles us.

And on the one hand, our debtor tells us, we pushed hard on every material term, and on the other hand, the agents,

both Citibank and UBS, can't recall the push-back. What they do tell you they recall is that it was communicated to them that the creditors' committee wanted them to consider, a la Smurfit Stone and Aleris, provisions where they'd extend the maturity for a cash payment. That's what they recall.

And that provision was rejected, according to the testimony, because it was too late. It was a material term already built into the documentation. And, Your Honor, here's what's wrong with that as a matter of policy. And I took special interest in Ms. Martin's argument in this regard, and she was talking about the practicality of getting a material provision changed.

If she's right, then you don't need a creditors' committee. Forget about them. Run into court on an interim financing, which is typically the first day of the case, get a provision stuck in a term sheet or placed in a term sheet with lots of pre-thought associated with it -- not the case we have here -- one that's subsequently discussed on the merits in terms of what it meant in terms of risk/reward -- not what we had here -- and the mere fact that it's in a term sheet, is a material term, comes before the Court on an interim means; we don't care what a creditors' committee has to say about this afterwards. People who negotiate post-petition financing understand or are construed to have understood to their detriment that they could come up with as many material terms

as they want. The Court can approve it on an interim financing basis, but that the Court does that, as this Court did, without prejudice to the rights of general unsecured creditors speaking through an official creditors' committee that gets appointed after the fact. How dare they throughout all of their testimony, the only record they've established, tell you that the rationale for the maturity date -- and, Your Honor, I challenge them, either the debtor or the lenders to find one iota of proof in any of the trial testimony so far that there was a considered reasoned judgment made about the maturity date or the extension of the maturity date, as requested by the committee. I mean, what function did they think the committee was ultimately going to play?

The testimony is it was too late by then. Why was it too late? It was locked into the term sheet. That was a material term.

Your Honor, there's a reason, at least in my opinion, that UBS became the agent on that fateful evening. I think it has a lot to do with the character of the participants, the other members of the group of fourteen. And if you take ABN AMRO out, as I guess they're desperate to get out now because of the way they think they've been, to use their language, unfairly and unreasonably treated at the very end of this process, they're being unfairly and unreasonably treated from their perspective not by the debtor, certainly not by the

general unsecured creditors of the estate, but by part of this group of funds that we spent so much time dealing with and negotiating over, not in terms of what's in the best interests of the debtor and its estate vis-a-vis the lenders, not with a lot of attention to what's the maturity, what's the amount that we're borrowing, what are the covenants. The attention and focus and the time delay has been on intercreditor issues, how does the roll-up work, how does the loan get effectuated, syndicated, sold out to other creditors that are interested in the loan.

And, by the way, again, before I forget, it is a matter of evidence, you heard testimony -- I can't remember from what witness -- about this DIP facility trading below par. And then you heard a lot of what I think was lawyers' testimony from the podium about trading. I want to remind Your Honor that, likewise, as a matter of evidence, we have in the Maxwell declaration, which again, Your Honor, was not contested in any way, shape or form, that at Page 6, Paragraph 18, last sentence notes:

"The highly attractive pricing and terms ceded on the DIP facility relative to the current market is substantiated by recent market bids over par for the DIP facility."

Bam, bam, bam, he knocked it out of the park, and they never called him.

Your Honor, I also want to focus on the whole notion

that we've got to compare these terms to a marketplace, this illusive concept of a market. And you were told by Mr. Huebner about the Tronox case. And he picked it because it's a 2009 Southern District of New York case -- I think the judge is Judge Gonzalez -- that approved a three-hundred-and-sixty-four-day term DIP loan with no built-in extensions of maturity. And you were told that like LyondellBasell, Tronox is a chemical company, and that like LyondellBasell, Tronox has European operations. Unlike LyondellBasell, the DIP facility in Tronox is all of $125 million. It's a dramatically smaller company. Revenues of $1.7 billion compared to this debtor, revenues of forty-two-and-a-half billion dollars. Total indebtedness, 700 million compared to 24 billion. Eighteen hundred employees versus 18,000 employees.

My point is simply this: For purposes that serve them, the lenders and the debtors want to talk to you about how the terms of this facility compares to a so-called market. When it's inconvenient for them, they argue to you that there is no market, we made this market. The reality is they're right, they did make this market. The economic terms they created in terms of what the cost of the DIP facility is. But to suggest that we shouldn't have a mechanism for extending the maturity more than the eleven and a half months originally proposed, and I think we're down to nine and a half months if it gets approved today, by comparing it to any other DIP

facility is literally comparing apples to oranges.

Judge, there is only -- and I want to wrap this up and come down to my final point. You heard from Mr. Ellenberg the argument that we're going to make it from a timing perspective, don't worry about it, you know, we're going to do the plan, the disclosure statement, the business plan development, it's all going to happen in enough time to get us to a December 1st confirmation hearing. And with all due respect to Mr. Huebner, frankly, the changes that were made last night are, from my perspective, more onerous and burdensome, except to clarify that all you got to do is start the hearing. That's all you have to do.

The debtors are now under an obligation to start the hearing with a reasonable belief that they can get the relief on that date. I mean, it's a whole other layer of complication before the debtors can get beyond December 1.

Here's my point. You know, the debtors support their proposition that they can get this case done anywhere within the unreasonable time frames being suggested. Why? Because you're to understand this is a balance sheet problem. You got it? Mr. Ellenberg said, we've got a massive interest burden, and that's the main problem to fix, that somehow fixing a balance sheet because you have too much interest, that's a snap and a walk in the park.

Well, Your Honor, let me suggest this. The committee

has retained, subject to Your Honor's approval, Chemical Markets Associates. We assert that they are the premiere party in terms of being able to assist companies, their creditors, their shareholders with analyzing investments in the chemical field. So important are they, in fact, that our debtors are subscribers to their services, as is, I would venture to guess, a lot of our lender constituency and virtually all of our competitors.

Likewise, we have retained through CMAI an industry expert in the petro -- in the refining area to supplement those services of CMAI that may not spill over into the refining area. What the committee's experts are undertaking now in connection with the perceived valuation fight is a process that they tell us will take them potentially months to complete. And that is understanding on a fundamental facility-by-facility basis what is the optimum operating profile of all of those facilities because unless and until you can understand the maximum operating output of those facilities, unless you can understand the margins, and unless you can understand the extent to which the modeling that this debtor does is or isn't sophisticated enough to run these assets, you can't even begin to figure out how to do a financial restructuring.

A financial restructuring is more than just saying, well, I've got too much debt on my balance sheet, by the way, debt that was put on less than a year ago by presumably very

sophisticated lenders. This, Your Honor, make no mistake about it, is ultimately a combination of an operational overhaul with attendant financial implications. I know the lenders, the senior lenders would love to minimize the issue to a balance sheet test because if that's all it is, then we might as well go to a confirmation hearing tomorrow where they tell you that we've got to lop off the substantial interest burden, convert their debt into equity, adios everybody else, nice to see you.

And, Your Honor, that's at the heart of the maturity issue and that's at the heart of the milestone issue. It's about having an opportunity for the unsecured creditors to present their case, that for some $36 billion worth of value that makes our equity owner Access in the money, that's got to be proven.

Now, the difference between Access and the general unsecured creditor constituency is Access has the opportunity through its own buying power to effect a result through the writing of a check. We only have the opportunity to effect the result through the indulgence of this Court and the preparation of competent evidence.

To approve a DIP facility of this magnitude, given what happened to this company as quickly as it happened, with the milestones that are being implicated and with the interim effect the management change issues have on our management is the functional equivalent of taking the unsecured creditors'

processionals and requiring them to tie hands behind their back for the balance of the case. It ties Your Honor's hands, as we've indicated before, in terms of considering exclusivity extensions, in terms of thinking about the reasonableness of notice on things like disclosure statements.

Your Honor, just about every other party that came to this podium concerned about this DIP financing and its implications will have another bite at the apple. They will all of them be able to argue their legal issues at or about a confirmation hearing if we ever get to one. They'll all be able to argue about the implications for their clients based on intercreditor or interestate payments and whether payments to foreign creditors were adequately secured or not, or whether there was dilution or diminution in value. Boy, I hope for the day that there is enough time and effort to go through those issues. We've got one shot, "we" being the general unsecured creditor constituency, one shot. And that's to tell these lenders, again not your typical banks, not that there's anything wrong with being a hedge fund. Some of my friends run hedge funds. But tell these guys that they're not capturing the value that could be available over the repayment of their debt by in the largest single DIP ever considered by a Bankruptcy Court anywhere they want an eleven-month maturity. Why? Because it's a fundamental term of the deal. When was it put in place? Not too sure, it may have been come from Access.

What kind of push-back did you get from the debtor? Not anything we can generally remember. Did you know that the committee wanted you to extend it? Yeah, they wanted to be able to pay for an extension. What did you do about that? Didn't feel like budging.

I think the characterization I got from debtors' counsel was on certain issues they were intransigent. On certain other issues they were being petty. Well, I don't know that they're entitled to be intransigent and petty in these circumstances, given the benefits that they're asking Your Honor for: Roll-up, 506(c) waiver, payment of post-petition interest on a cash-pay basis with a negative arbitrage to the estate. The benefits just keep on rolling. They got to make a concession, Judge. And the concession they have to make is on reasonable capability to extend the maturity because that will bring them to the table. That will afford the general unsecured creditors the opportunity to deal with issues and attempt to resolve them consensually. If there's a deadline, we're out of business. And if there's an unreasonable deadline, we've really done something untoward to the process.

And for all those reasons, Your Honor, and again, because they can't tell you that something is inviolate because it was conceived and agreed to before a creditors' committee was even formed, that can't be the reason. But that's what you're being told. It is what it is because it got approved

before the trappings of this Court ever got involved. And in this regard, Your Honor, the statutory committee does really serve as a trapping of the Court in an effort to protect the process.

At the end of the day, let's look at it. Our -- is the DIP likely to get repaid? Yes. That's the debtors' evidence. Likely to get paid with, as Mr. Huebner indicated, billions and billions of dollars worth of cushion. Are the senior secured credit facility holders likely to get repaid in this case, either through the roll-up or through the non-roll-up? The answer is yes. They've got billions and billions of dollars worth of cushion.

Given the billions and billions of dollars of cushion, the fact that we're being charged twenty percent all in on this facility, that a good portion of it is going to pay pre-petition debt at a huge negative arbitrage, given the other protective provisions that the lenders have sought, no one is taking away from the debtor the fact that this was a, quote, "Herculean effort," and it's a, quote, "miracle that we're here." Well, the miracle became a lot easier once the debtor conceded the roll-up issue.

Enough is enough. You can't turn over control of the case to the lender group of fourteen, thirteen, or however many funds we're talking about this early in the process, especially when Your Honor knows from experience that you can't get to

confirmation by December 1st, no matter what the debtor tells you, and that worse than the maturity date, you can't achieve the milestones. You know it sitting here today in your heart of hearts; you know it in your head. How can you approve an order that contemplates, suggests that that's doable? There is both the need for propriety and the need for the appearance of propriety. It's a joke. And Your Honor shouldn't lend your imprimatur to a scheme that has the suggestion that one of the largest companies ever to seek protection before this or any other Bankruptcy Court is going to hit milestones in two or three months. It's comical.

And, Your Honor, for those reasons, we would respectfully request that Your Honor condition approval of this loan on, among other things, a change in the maturity date and a change in the milestones.

Thank you, Judge.

THE COURT: All right. Have I heard everything now? Mr. Ellenberg, is there any desire to surreply?

MR. ELLENBERG: May we give a brief response, Your Honor?

THE COURT: Yes.

MR. ELLENBERG: Your Honor, could we have a short recess? I would like to --

THE COURT: Ten minutes.

MR. ELLENBERG: -- perhaps just have a single

response.

Thank you.

(Recess taken at 12:37 p.m.)

(Proceedings resume at 12:44 p.m.)

THE COURT: Have seats.

Mr. Ellenberg.

MR. ELLENBERG: If the Court please, Mark Ellenberg on behalf of the debtors, Your Honor. I will be responding on behalf of the debtors and the lenders with respect to the final DIP closings that we just heard from the committee, Bank of New York and Law Debenture.

Your Honor, with respect to the Bank of New York, we agree that Bank of New York is entitled to adequate protection. We are giving them adequate protection in the form of an equity cushion.

What I think I heard Mr. Siegel saying is that he has an equity cushion now, and because he's being primed, the equity cushion is being -- getting smaller, and he needs to be compensated for that. And that, of course, is not the law. By definition, any time you prime a lender, a pre-petition lender who has an equity cushion, the equity cushion is going to get smaller, by definition. The question is, how big is the remaining cushion and does it meet the minimum standard that the cases have required.

So, here, we have a nineteen-percent cushion. It

doubles the standard in the cases, and that is his adequate protection under the Bankruptcy Code and the United States Constitution.

Again, Mr. Siegel said he was confused as to whether there was evidence as to the borrowing needs of LCC and Equistar. Your Honor, there was specific, clear evidence on that point as to both of those companies. Mr. Bigman testified about it, there were exhibits on it, I mentioned the numbers already; there is no confusion about that. It was clear and it was specific to those entities.

With respect to Law Debenture, Your Honor, I think Mr. Rosenbloom suggested that it is unfair to his clients to be burdened by this DIP since they are not getting any benefit from it. Number one, Your Honor, Millennium would be dead without this DIP. If there is no DIP loan, there is no Millennium, they are in liquidation, just like every other company that is in Chapter 11 before you now.

Moreover, Your Honor, Millennium owns twenty-nine percent of Equistar. It's one of their primary assets.

Finally, Your Honor, Law Debenture suggested that adequate protection must be provided because they're losing their limited guarantee. Well, Your Honor, they are unsecured creditors. They are not entitled to adequate protection.

Finally, Your Honor, with respect to the committee, only a few things the committee said require a response.

First, Your Honor, we've heard way too much already about the maturity date, but counsel was quite selective in his view of the record. For example, counsel said there was no evidence from any witness that the debtors ever pushed back. He was shocked that we had said it when no witness would support it. Well, as one example, I'm reading from Paragraph 5 of Mr. Jaffe's declaration where he's actually quoting himself from his deposition. And he says:

> "The debtors' financial company Evercore pushed back on the one-year maturity date initially, but I think the lenders all very quickly said, look, due to what I said before, a lack of visibility, we think this is the norm. We pushed back on that, and said, it's going to be one year. And I think there were bigger issues to handle at the time. The company needed to raise 3 billion."

So there was some push-back from -- my recollection is from Evercore, but the lenders quickly said, we're not -- we weren't going to do something longer than a year. So there is evidence of push-back, Your Honor. And, again, this was a very compressed negotiation period during which a lot of things had to get accomplished. But, clearly, there is evidence of push-back.

Similarly, Your Honor, counsel questioned Mr. Huebner's statement that Mr. Jaffe was an expert on DIPs. He

didn't know where that came from. It comes from the transcript of Mr. Jaffe's deposition. He describes his experience and his expertise on the subject.

In addition, Your Honor, counsel quoted Mr. Jaffe as saying that when he was asked whether he could provide any examples about a one-year DIP, he said, I couldn't -- I can't come up with one off the top of my head. What counsel didn't read was the next sentence, which says, "But I'll go home and dig some up for you." In fact, he did that. There are over nine of them. They're cited in the briefs filed by Davis Polk. The debtors have filed a different one. So there were at least nine examples of a one-year DIP that have been in the papers, and they were provided by Mr. Jaffe and Davis Polk.

Mr. Dugan and Mr. Jaffe and other witnesses clearly stated that there were economic reasons for the denial of the -- of a term longer than one year. And in particular, when Mr. Dugan was being examined about why the committee's request, recent request post-term sheet to the steering committee for the ability to pay for additional expenses, when he was asked why that was considered and why it was turned down, he said, because of the same reasons we turned it down before: We didn't want to take the risk. And counsel said, oh, so there was no economic reason, it was just you didn't want to do it. And he pushed back. He said, no, I told you what the reasons were, they were economic reasons --

THE COURT: Okay. Source of this again, please?

MR. ELLENBERG: It was Mr. Dugan's cross-examination, Your Honor.

THE COURT: Mr. Dugan's cross here?

MR. ELLENBERG: Yes. And I'm sorry that there's no transcript available.

THE COURT: Right.

MR. ELLENBERG: But he was clearly asked, you know, why did the lenders even now when the committee asked turn down the request for extensions, and he gave an answer that there were economic reasons, and they're the same economic reasons that were described in the testimony of Mr. Jaffe and that were given to the debtors when we were trying to negotiate the term sheet.

Now, finally, Your Honor, Mr. Weisfelner said that the lenders are not entitled just to be intransigent and petty, that at some point they need to make a concession. Your Honor, they're giving us $3.25 billion in new money, they're giving us continued access to 1.5 billion in liquidity; I think that's a pretty good concession. It's what we need to keep this company alive.

Once again, Your Honor, I can't over-emphasize, all of these issues have to be viewed in perspective. They have to be viewed as part of the larger deal. We concede it's not perfect. We would like things to be different. This is the

deal we have. We urge Your Honor to approve it.

Thank you.

THE COURT: Thank you.

All right. I think I have unresolved issues on cash management. Is that correct? Where's the U.S. Trustee objector?

MR. FRIEDMAN: Your Honor, I think he may be in the overflow room. May I just have a moment to go get Mr. --

THE COURT: Yeah. Tell him I'm waiting here.

MS. MARTIN: Your Honor, in the meantime, can I just point you to a provision in the credit agreement that may answer one of your questions on indemnity?

THE COURT: If it's merely a cite.

MS. MARTIN: It's a cite. If you look at the introductory paragraph of the credit agreement, which defines "lenders," and then 9.08 of the credit agreement --

THE COURT: 9.08?

MS. MARTIN: Right. It says who's providing the indemnity, which is the defined term of "lender."

THE COURT: Lender under the term?

MS. MARTIN: Lender under the debtor-in-possession credit agreement, right, the term.

THE COURT: Okay.

MS. MARTIN: Not the pre-petition.

THE COURT: As compared to any of the other post-

petition facilities?

MS. MARTIN: Right.

THE COURT: Okay.

MR. FRIEDMAN: Thank you, Your Honor. Peter Friedman from Cadwalader on behalf of the debtors. We filed our cash management motion and investment guidelines motion on the first day and received interim approval in connection with those. Subsequently, we received a variety of objections from the committee, which we resolved consensually, from Violia Industries, which we resolved consensually, Bank of New York which we resolved consensually, Law Debenture Trust Company which we resolved consensually. The U.S. Trustee has asserted a few objections, I think particularly to the debtors' use -- or maintenance of some accounts under its existing cash management system that are not on their approved -- authorized list of depositories.

As we noted in our response papers, it's a small number of accounts that remain. Seven of them we already intend to close. A number of the other ones are lock-box accounts which get swept every day into institutions which are approved. There are certain accounts which are in foreign countries which we -- the debtors use to pay customs and other import duties, trade services, utilities where they're required by local regulations in foreign jurisdictions to use a local bank, so we believe that's appropriate as well.

I think there are certain accounts that are under SEC -- I'm not sure if "trusteeship" is the right word, but are in connection with investments the debtor had in the money market fund that broke the buck --

THE COURT: Like reserve funds?

MR. FRIEDMAN: Yes, Your Honor.

THE COURT: Okay.

MR. FRIEDMAN: And so, obviously, there's nothing the debtors can really do about that. And I believe in the end, there's maybe one account at an institution which is approximately $620,000. It's an environmental remediation account where disbursements are controlled by counsel. We just -- we believe it's appropriate to be able to continue that fund -- that account as is at PNC Advisers.

With respect to the investment guidelines, I would make two points. One is that we do believe that with the liquidity, hopefully provided in the DIP and given that -- I think draws under the DIP are $250 million as well as the fact, although the trustee has pointed out that to this point, the debtors don't have excess cash, obviously there is a seasonality of the debtors' business and it's projected that cash will be greater in the year, so there may be excess cash. Obviously, the DIP lenders are hoping there's excess cash so that they'll have their interest paid. So I believe the investment guidelines are appropriate. I believe the --

there's actually been no substantive objections to the existing guidelines. There are provisions in the DIP that provide for -- with certainly the lenders' consent and I think if the DIP credit agreement was approved, would permit the debtors to invest in certain things beyond solely -- you know, solely what's statute -- what, you know, what's required in the statute, but that, you know -- but the Court is permitted to authorize.

And so I want to keep it simple. For those reasons, we request entry of the final order with respect to the cash management system and investment guidelines that we've proposed.

THE COURT: Okay. Mr. Schwartzberg?

MR. SCHWARTZBERG: Your Honor, Paul Schwartzberg for the U.S. Trustee's Office. I'll keep it quick.

With regard to the authorized depositories or non-authorized depositories, we did receive a response just recently, and it appears that there is only one account at PNC Advisers that is in an unauthorized depository. On top of that, there's the concern that some of the accounts, although we don't know how much is in any of them, are significantly more than that which is the security that has been pledged to the -- in the Southern District. For instance, on the motion itself, there's $100 million in a Citibank account. My understanding is Citibank has only pledged about $17 million to

the Southern District. So that excess amount would be at risk.

And, similarly, with the investment guidelines that go beyond 345, there's a concern there why can't those be put in things that comply with 345. To the extent that any benefit is going to be achieved beyond what could be achieved under 345, it hasn't been set forth to us or in any of the pleadings.

THE COURT: All right. Do you need or want to reply, Mr. Friedman?

MR. FRIEDMAN: Not unless you have any specific questions, Your Honor.

THE COURT: All right, folks. Frankly, I can't find my pre-argument notes vis-a-vis this matter, but I can rule from memory, and based upon what I've just heard now.

The debtors' motion is granted in part and denied in part, and the following are the bases for my exercise of my discretion in this regard.

Anybody who's been paying attention to the newspapers in the last year, and who has not been on another solar system, knows the underlying basis for concerns articulated by the U.S. Trustee and as are announced in 345. Moreover, the fact that the debtor has 37 million bucks tied up in the reserve fund, a failed money market fund, underscores that the U.S. Trustee's objections are hardly frivolous, are reasonable in origin, and that they require much more attention by bankruptcy judges now than they required two years ago, five years ago, or ten years

ago.

With that said, we have to apply some common sense. Because of liquidity concerns, balances are relatively low now, which eliminates the instantaneous need to respond to these concerns, but we have to pay attention to matters for the last year. To the extent that bank accounts have to be maintained in foreign jurisdictions, or particular banks to comply with local law, the debtors have authority to comply with that.

To the extent that the debtors would be disrupting their relationships with their accounts receivable payors, and would be just raising the risk that if they changed the instructions to the payors collecting receivables, which is important to any business large and small, the benefits of compliance with that would -- with 345 would be far outweighed by the potential prejudice to the estate, and that's particularly so since the accounts are swept on a daily basis.

I am waiving 345 compliance on the lock boxes, but I am going to require the debtor to consult with the creditors' committee and the U.S. Trustee before there is any material change in its practice of sweeping its lock boxes on a daily basis.

The debtors are to use their best efforts to get the money out of the reserve fund as soon as the compliance proceeding or the enforcement proceeding permits that, and for them to get whatever they can out of the reserve fund when that

time comes, and perhaps as the most challenging aspect of this, they are to use their best efforts within the next thirty days to bring any other cash balances, even if they're at Citibank, into alternative depositories that reduce their exposure down to protected limits. I don't care whether that's with fully 345 compliant institutions by collateralization arrangements or by spreading the money among alternative institutions, but the debtors will comply within thirty days of this date, unless by request prior to that time, that period for compliance is extended for cause.

I'm going to simply so order the record and invite the debtors to paper that order at their convenience which, given their other burdens, may be several days or more than that from now.

MR. FRIEDMAN: Thank you, Your Honor.

THE COURT: All right. Mr. Schwartzberg, your time to appeal if you're not happy with that ruling, or for that matter any other parties in interest, will run from the date of the papered order, not from today.

MR. SCHWARTZBERG: Thank you, Your Honor. So now that we understand, obviously, the Code provides Your Honor discretion in that matter.

THE COURT: Okay.

MR. FRIEDMAN: Your Honor, may I just inquire as to the investment guidelines you approved?

THE COURT: Except insofar as I spoke, I have no problems with anything that was proposed.

MR. FRIEDMAN: Thank you.

THE COURT: Everything else is approved as modified by your deals with other stakeholders.

MR. FRIEDMAN: Thank you, Your Honor.

THE COURT: Okay. Do we have anything else before I can take a recess now?

(No verbal response.)

THE COURT: All right. Here's what we're going to do, folks. I'm going to try very hard to give you a ruling today. Obviously, it wouldn't be as extensive today as it would be if I took the time to write, but I think that would be contrary to everyone's interests.

It's going to be no earlier than late afternoon, and possibly into the evening. You can plan your lives accordingly. I am going to ask my recording staff to have the machine available for a dictated decision today, and I'm going to ask my courtroom deputy either from the courthouse or from home to be in a position to enter an order today if I approve it with the recognition that I'm not in a position now to tell you how extensive any order might be changed from the one that's proposed to me, if in fact I approve it.

We're in recess.

(Recess taken at 1:05 p.m.)

(Proceedings resume at 7:03 p.m.)

THE COURT: Have seats, everybody. Have seats.

You've waited a long time. Are you rising for a particular purpose?

MR. KLEIN: I'd like to make one quick clarification, Your Honor, if I may.

THE COURT: May I get your name, please?

MR. KLEIN: Darren Klein from Davis, Polk & Wardwell on behalf of Citibank.

THE COURT: Yes, Mr. Klein.

MR. KLEIN: Earlier today, when a lot of paper was flying around and a lot of people were speaking on the fly, I just want to make one quick clarification just so the record is perfectly clear. We were discussing in the context of ABN AMRO's objection the pre-petition amendment that was recently filed, and does it or does it not impact the borrower. And it does not.

But in that context, questions about indemnity language were raised which Your Honor may recall.

THE COURT: Uh-huh.

MR. KLEIN: And my partner Mr. Huebner said that that indemnity language is a lender indemnity, which is absolutely true. However, there is similar language in one of the borrower indemnities. So we just wanted to make this clarification so that the record is full and complete. And

that language relates to indemnifying the term DIP agent solely with respect to the roll-up.

And if it's okay with Your Honor, I'd just like to read that language into the record.

THE COURT: Well, is this the language that's there now, or a proposed change that you might make?

MR. KLEIN: This language has been in the term DIP credit agreement since the beginning. It was in the version filed a week ago. This has nothing to do with the pre-petition amendment and is solely about the term DIP credit agreement.

THE COURT: Where are you reading from?

MR. KLEIN: Section 10.05 on Page 134.

THE COURT: This in classic corporate form starts in single-spaced text at the top third of the page and runs without a new paragraph for the remainder of that page and two-thirds of the following page.

MR. KLEIN: I would --

MR. WEISFELNER: Your Honor, can I try and put this in context because I think after four hours, we don't need to shuffle things around and, for lack of a better term, hide the salami, not that I'm accusing anybody of anything. But Your Honor will recall that I popped up --

THE COURT: I remember well.

MR. WEISFELNER: -- and based on certain representations, I sat down. Although I have a tendency to do

that a lot, this was one particular time I popped up and then sat down. I popped up because my ears perked up on the notion that the borrowers here, our debtor-in-possession would be indemnifying the agent in the context of two very extraordinary circumstances: One, a contention by ABN AMRO that there was something untoward about the nature of the amendment, that it prejudiced the interests of pre-petition lenders, and that while the debtor shouldn't care, there could be hell to pay among the lenders, or that the debtor may have to care to the extent the debtor is indemnifying the agent. We were told they weren't. That's why I sat down.

I stand up now because we're told, well, we didn't really mean it, we are indemnifying the agent -- "we," being the debtor -- not only are we indemnifying the agent, but the way we've defined the language, we're indemnifying the agent even if it's determined -- or, I'm sorry, we're defining the agent for all of its activities, including but not limited to the promulgation of this amendment, even to the extent that one were to determine -- or they're asking Your Honor to define that conduct as being something other than gross negligence or willful misconduct. You're, in effect, making that finding.

Your Honor, that's cutting a little too close to the bone in terms of being scary from the proposition of the estate. This is not, you know, something out there that appears to be hypothetical. It's something out there that

appears to be potentially pretty real.

MR. KLEIN: Your Honor, I don't mean to interrupt, but I feel I was interrupted, and it might make sense just to --

THE COURT: Well, Mr. Klein, if you can make the issue go away, then I'll hear you now. But I must tell you, Mr. Klein, that the entire decision that I wrote or prepared for dictating, including and perhaps especially my rulings vis-a-vis Ms. Schonholtz's concerns, was premised on what I was told before. And if what I was told before is no longer the case, then we're going to have to reevaluate the rulings which I am about to deliver on that, and that if it turns out after full argument -- and I'll give people more opportunity for argument -- that Mr. Weisfelner's concerns in that regard continue to be true --

MR. KLEIN: I understand, Your Honor.

THE COURT: -- that's going to impair my ability to approve a provision of that character.

MR. KLEIN: I understand, Your Honor. I think maybe if I read it, Your Honor might be comfortable with it. But I would just like to say that the discussion at the time was about the lender indemnity, and Mr. Huebner, bless his heart, he's done many things for this company, but he hasn't very opened the term credit agreement and was not aware of this provision.

THE COURT: Well, you can certainly tell me where the

provision it.

MR. KLEIN: It's Section 10.05, Your Honor.

THE COURT: Yeah. That's what I was talking about that running over two pages. I need more specificity than that.

MR. KLEIN: Sure. It begins at the first line on 134 with the "Provided further."

THE COURT: Uh-huh.

MR. KLEIN: "Provided further that such indemnitee shall not as to any indemnity be available to the extent that such liabilities, obligations, losses, damages, penalties, claims, demands, actions, judgments, suits, costs, expenses or disbursements resulted from the gross negligence or willful misconduct of such indemnitee, or of any affiliate, director, officer, partner, employee, counsel, agent, trustee, advisor or attorney-in-fact of the indemnitee as determined by a final judgment of a Court of competent jurisdiction."

And now we get to the parenthetical:

"It being understood and agreed that the design, development, negotiation, documentation, closing, execution or implementation of the transfer or designation of the roll-up loans in and of itself shall not -- shall in no event be deemed to constitute

gross negligence or willful misconduct for purposes hereof."

I would just make one further note, Your Honor, that this is not indemnifying the lenders. This provision relates solely to the term DIP agent.

THE COURT: UBS?

MR. KLEIN: UBS.

THE COURT: I'm not going to decide that now.

MR. KLEIN: Thank you, Your Honor.

THE COURT: We have a lot of people in the room who have been waiting six and a half hours for a decision. I'm going to deliver it.

In this contested matter in the jointly administered Chapter 11 cases of Lyondell Chemical Company and its affiliates, the debtors move for final approval of their proposed DIP financing. Subject to adjustment of a few dates in the milestone provision of Section 6.18 of the term loan agreement and anywhere else provisions of that substance appear, and revisions to make clear my neutrality in the intercreditor disputes which are the subject of the objections by ABN AMRO, all of which are very minor in the scheme of things but are absolutely essential from an institutional point of view and which are matters that I will not waive, I'm approving the proposed financing.

There follows a summary, which will probably take

about half an hour for me to dictate, of the bases for this ruling:

The standards for approval of a facility of this character were set forth by Judge Jerry Venters in his very frequently cited decision in Farmland Industries, 294 BR 855, Bankruptcy Western District of Missouri, 2003. As Judge Venters set forth the standards, they are:

One, that the proposed financing is an exercise of sound and reasonable business judgment;

Two, that the financing is in the best interests of the estate and its creditors;

Three, that the credit transaction is necessary to preserve the assets of the estate and is necessary, essential and appropriate for the continued operation of the debtors' businesses;

Four, that the terms of the transaction are fair, reasonable and adequate, given the circumstances of the debtor/borrower and the proposed lender;

And, five, that the financing was negotiated in good faith and at arm's length between the debtors, on the one hand, and the agents and the lenders on the other hand.

Rearranging, and for purposes of discussion, in order of increasing difficulty, I'm going to address them in turn.

The first that I should address, which is Number 3 in Judge Venter's decision, is whether the financing is necessary;

that is, whether the credit transaction is necessary to preserve the assets of the estate and is necessary, essential and appropriate for the continued operation of the debtors' business. In that regard, there can be no doubt. It's not disputed by anyone. The debtors absolutely need the requested funding, and without it, they would quickly liquidate. This isn't a matter of judgment or opinion; it's a matter of reality and is wholly undisputed. This financing is of the highest importance that one could possibly imagine with respect to this estate.

The second requirement is that the financing is in the best interests of the estate and its creditors. And, certainly from an overall perspective, that, once more, cannot be doubted.

The third factor, as I'm ordering them now, which was the first that those -- of those that Judge Venters articulated, was that the proposed financing is an exercise of sound and reasonable business judgment. I've considered the testimony with respect to the efforts by the debtors and their professionals to get this deal put together and to negotiate the best terms they could. And I'm satisfied that this requirement has likewise been satisfied.

I noted before at the DIP preliminary hearing, and my view hasn't changed, that the terms that are now available for DIP financings in the current economic environment aren't as

desirable as they were when I ruled on similar motions earlier in my tenure on the bench. But I can't find any fault with respect to the efforts in trying to -- the efforts by the estate in trying to do and get the best deal it could, and I can't ignore the facts as to the present state of the financial markets which, understandably, were a major element of the evidence and argument in the hearing that took place before me over the last three days. See, for example, Jaffe declaration, Paragraph 9, and the designated deposition testimony that was quoted at that point in the declaration.

I found Mr. Dugan to be a very credible witness, even after cross-examination, and though I didn't see Mr. Jaffe live and had to rely on his testimony that I read, I see no basis for not accepting his testimony as well. They described the state of the credit markets and the challenges the debtors faced in trying to get the financing they did.

Talking about some relatively minor inconsistencies in testimony as to who asked for what and when; what do we know from that? Among other things, different lender representatives, businesspeople and counsel, dealt with different borrower representatives, businesspeople and counsel. I think it's true that there are some seeming inconsistences between the recollections of the lender witnesses, Jaffe and Dugan, and of Mr. Bigman as set forth to me in this hearing. But I think that any inconsistencies in that regard are not

material by reason of Mr. Dugan having missed two important meetings in the early days of the negotiations, and, importantly, by my recognition of the role of the professionals, like counsel and Evercore in the negotiations. See, for example, Jaffe deposition, Page 32 to 33 describing push-back from Evercore.

I agree with the creditors' committee that when management is conflicted in making a business decision it can no longer rely on the business judgment rule, and instead, its transactions have to be evaluated on a total fairness strict scrutiny type of standard. But I find as a fact that there was no material management self-interest affecting this financing as analyzed, negotiated, or ultimately agreed to by the debtors.

The fourth requirement that I need to focus on, Number 5 in Judge Venters' list in Farmland is that the financing agreement was negotiated in good faith and at arm's length between the debtors, on the one hand, and the agents and the lenders on the other hand. Good faith is important as one of the Farmland factors, and also because a good faith finding is important under Section 364(e) of the Code if an Appellate Court is asked to reverse or modify a decision authorizing the financing or the grant of the liens.

Good faith is measured with respect to the good faith of the lender as contrasted to that of the borrower. While

there were early questions articulated as possible good-faith issues with respect to this financing, and I permitted discovery to depose lender agent personnel to investigate any questions in this regard, no evidence ultimately was presented to me to have any basis for me to question anyone's good faith. In particular, I listened very hard for indications that the lenders had demanded terms that they knew in advance would result in preordained default or that they were looking to do this financing for any ulterior purpose, for example, for reasons other than a good-faith desire to get paid back, to make money on interest and fees, and to protect pre-petition positions, all of which are understandable and acceptable motivations for a DIP lender to do a deal. There were no such indications here.

It's hard to prove a negative except by the conspicuous absence of facts to the contrary, and that's what we have here. Good faith is a matter as to which we judges make a good-faith finding when, after a fair opportunity to show that good faith isn't present, we don't see or hear anything to lead us to believe that parties were proceeding in any way other than in good faith. That being the case here, I find the good-faith requirement satisfied.

The last requirement, Number 4 in the Farmland list, is that the terms of the transaction are fair, reasonable and adequate, given the circumstances of the debtor/borrower and

the proposed lender. This factor is where the creditors' committee has the greatest concerns, and where the issues most worthy of discussion exist. I'll discuss the various aspects of the issues raised under this factor in turn.

Turning first to covenants, covenants, especially financial covenants, are trip wires to give earlier warning of more serious defaults, such as payment defaults, and permit corrective measures or exercises of remedies. As a general matter, they're normally acceptable if they're not calculated in advance to result in preordained default or have that effect. There was extensive lender testimony as to the reasons for the financial covenants, for example Citibank witness Jaffe at Paragraphs 10 through 12 of his declaration, and I find the financial covenants to be reasonable.

The next category deals with the provisions relating to changes in management, or as the issue was articulated in one of the creditor committee briefs, mechanisms to rest operating control. Given the surprises that resulted from the debtors announcing their financial performance so late in 2008 and the material drop in operating performance, all of the debtors' creditors, including their lenders, would have understandable needs and concerns to take a look at management. That's not necessarily an indictment of incumbent management. Changing or supplementing management is considered in many, if not most, Chapter 11 cases. But the lenders expanding on

creditors' usual desire to at least consider management changes was not unreasonable.

My more serious concern, as I noted in oral argument, was not reserving the right to change management, but the effect of the reservation of that right on management conduct during the Chapter 11 case, especially management's taking side on intercreditor issues in connection with the formulation of a plan.

Provisions of that character would, to be sure, tend to discourage management from taking positions that would get lenders angry, but, here, the role of the independent directors, the role of the debtors' professionals, the debtors' prior conduct to date, and the fact that changes of management are a possibility in every Chapter 11 case collectively cause me to believe that any incidental effects of the type where management might feel pressured to side with the lenders on plan formulation issues are not material here.

Next, a matter once of concern to the creditors' committee was the expensive pricing for this facility; likewise, the related economic turns which were hardly ideal, such as a high rate of interest and the need to assume negative arbitrage on rolled up money. Ultimately, however, recognizing the state of the financing markets at this point in time, and the testimony I heard that describing the current market as a difficult market in which to obtain debtor financing statement

-- debtor financing, would be a, quote, "massive understatement," the committee did not appear to be pressing this objection.

In any event, by reason of present market conditions, as disappointing as the pricing terms are, I find the provisions reasonable here and now.

Folks, I should say that every decision we bankruptcy judges issue in this district, including dictated decisions after trial, tends to develop a life of its own and to become the precedent for the next case. I assume, or at least hope that economic conditions in this country, including freeze-ups of the lending markets and the very limited present availability of credit will ultimately improve. What I'm of a mind to recognize and respect now in the way of economic reality will be trumped by the facts on the ground with respect to economic conditions at the time of the next financing I'm asked to approve. And people should be wary of using this case as a precedent in the next one that comes down the road, especially if that's the case after the liquidity markets have loosened up.

The next area where specific provisions are a matter of creditors' committee concern is characterized as provisions that are devices to stymie inquiry. Those concerns relate to the budget given to the creditors' committee to investigate potential causes of action against lenders on behalf of the

estate in the time allowed to the creditors' committee to commence litigation on behalf of the estate if its investigation deems that to be warranted.

Provisions of the type that caused the creditors' committee to have those concerns would have been disapproved by me if they hadn't been changed between the time they were first proposed and now, but as modified they're satisfactory. One of the troublesome provisions would have allowed sixty days for the creditors' committee to investigate potential claims while unduly limiting the right of the creditors' committee to ask for an extension of time for cause. A provision of that character is required under Local Bankruptcy Rule 4001-2(f).

Now the provision still limits the grounds on which an extension can be requested, but it expands the time to June 1, ninety days from now, resulting in a total period of about 135 days from the time the creditors' committee's counsel was appointed. As modified, it's okay.

Another provision would have required commencing the suit within the required time when doing so would have first required securing STN authority eating up valuable time. It was modified to provide that the time requirement would be satisfied if a motion for STN authority were filed within the time limit, along with a proposed complaint. As STN motions can often take a long time to brief and argue, even when there's a strong likelihood that STN authority would be given

and the grounds for opposing the STN motion barely meet Rule 9011 standards, thus, that was an important change that had to be made. But now that it's been made, it's satisfactory to me.

Finally, the originally proposed twenty-five-thousand-dollar budget for creditors' committee investigation was ridiculous in a case of this size, but it was changed to $250,000 in the revised final order, and the language was changed to provide that it could also be used for prosecuting any such claims when lenders don't always agree to fund prosecution of the claims against them as contrasted to the essential investigation of the existence of such claims. As revised, it's satisfactory.

The most serious issues with respect to the terms of the facility were and are obvious. They resulted from the financing's one-year duration, or to be exact, duration of about two weeks short of one year, and the milestones were set up working backwards from that date. The maturity date is now December 15, and to state the obvious, we're now about six weeks into the case and the clock has been ticking.

I understand the committee's anxieties in this regard which are hardly imagined on their part. They're real, and they've been a matter of concern to me, as well. But the debtors, who don't like it either, agreed to the maturity date and the milestones as a matter of necessity and as a matter of what I've already determined was appropriate business judgment.

Now, looking at these provisions under a more of a strict scrutiny style of reasonableness, I find the maturity date, the duration of this facility to be sufficiently reasonable for me not to risk the loss of the facility by disapproving it.

There was much testimony relating to the maturity facility and ultimately satisfactory reasons were provided for requiring it. Jaffe testified that we thought it was a market term, that the lenders regarded it as justified by reason of having little long-term visibility into the company because numbers provided by the debtors were changing constantly, and that one year was sort of a market norm reflecting a new norm, new reduction from earlier cases in which DIP facilities commonly were two years.

It also was clear that the debtors pushed back to try to secure a longer term, though I see no evidence that they, as contrasted to the creditors' committee, pushed to get a paid-for option to extend, but the debtors and their professionals were unsuccessful by reason of the lenders declining to agree.

The lenders have also submitted evidence of other facilities of one-year duration. I'm not in a position to make a factual finding that one-year facilities are now the norm, even in the present environment, or, especially, that they would or should be the norm in better economic climates. The better way of putting the factual finding that I think I can

make is that they are now not atypical. I can and do find that a one-year facility is not now unreasonable. As Farmland states, we look at whether the terms are reasonable, given the circumstances of the debtor/borrower and the proposed lender.

I recognize, folks, that when I say that the one-year facility is not now unreasonable, that an equally satisfactory way of putting it is that it is reasonable.

Milestones by themselves are inoffensive, but they can be such, that is they can be offensive if they are unworkable from the outset or are designed to put the debtor into default. The evidence here appears to be undisputed that the milestones were fixed by going backward from the maturity date. Here, all seem to agree that they leave little room for error. But the debtors' evidence and representations were that they can be achieved. And there was no evidence that the milestones were put into place with the expectation or hope that they could not be met.

I find the milestones reasonable as a conceptual matter. And subject to my institutional needs, which I'll discuss momentarily, they are satisfactory as to their specifics.

As I said, I have important institutional needs which will result upon my insistence on revisions in the provisions relating to milestones and a corresponding adjustment in the maturity date to meet present obligations on my part as to

which I'm going to be out of town on some of the relevant dates, and more importantly, demands on the Court in this case and the increasing number of other major filings that this Court has received in this very, very bad economic environment.

Major Chapter 11 cases are coming into this court on a nearly daily basis providing material challenges to the judges of this court in managing their case loads and giving people hearings when parties want them. I've already had two filings with more than a billion dollars in debt this year. In mega cases, which used to be relatively unusual in this district, are now very close to being the norm. So are contested confirmation hearings. And in this economy, it's at least foreseeable, if it's not also likely, that things are going to get worse.

I will not allow debtors in a case on my watch to go in default on the facilities they need to survive because my calendar gets jammed or because of limits on my ability to push myself harder. I'll give you the language I'll insist on. It will basically obligate the debtor to commence the proceedings required under the milestones by their deadlines, unless I have to adjust that by the need to schedule my calendar, and it will give me the flexibility to hold multi-day hearings and to schedule them, and to allow me to give the matters on my watch the quality decisions you all deserve.

You will remember, perhaps cynically, what I was told

about how long this financing hearing would take. I will confess that I didn't really believe it then, and eight and a half years on the bench in this job have caused me to have a more realistic understanding of what litigation takes than the milestones even as redrafted in this case seem to reflect.

The practical effect of the provisions I'll insist on could bring the facility closer to its originally discussed one-year maturity, or even a few days passed that, depending on what my calendar looks like at the end of this year, and, of course, the extent, if any, to which there might be a several-day confirmation hearing and/or the need on my part to issue an extensive decision.

I don't know in practice whether the changes I'll insist upon are going to change the schedule or not, and while Jaffe said he didn't regard the difference between a December 15 and an actual one-year maturity as material, you know, maybe there's some jerk in the lending group who thinks it does. But either way, you're going to have to live with it.

The changes I'm going to insist upon are as follows, and I'll give one of your folks a copy of the markup to make sure that you draft it properly:

In Subparagraph C where it says, "The hearing is not concluded by October 15," it's going to be changed to 23rd. And where it says that, "Such deadline shall be deemed extended by up to ten days," it shall be changed to say, "extended

through October 30."

In Paragraph D, where it says, "With a reasonable belief that such confirmation could be obtained at such hearing by such date," the word "commencing" is going to be inserted before "by such date."

In the second-to-last line where it says, "shall be extended by up to ten days," it's going to be changed to twenty-one days. And at the end, it's going to say, "And the maturity date shall be adjusted by a like amount."

Lenders, if you don't like it, you can give me a new facility.

Other matters: Liens on avoidance actions. The creditors' committee also objects to granting liens on avoidance actions and to allowing super pri entitlements to reach avoidance action proceeds. Ultimately, I find what was done here to be acceptable, but I need to explain why.

The lenders argued that they drafted their entitlement in this area to only obtain a lien on the proceeds of avoidance actions and not liens on the actions themselves. Drafting to recognize that distinction affects who gets to control those actions, and that's no small thing. But it isn't the only issue.

The more important issue, of course, is who gets the economic benefit of any avoidance actions that turn out to be successful. As I said in my 2008 decision in Applied Theory,

2008 Westlaw 1869770:

"There is no hard and fast prohibition against granting liens on avoidance actions or granting super pri claims that would have the same economic substance, that is, allowing the super pri to siphon off value that would otherwise be available for admin claims or general unsecured claims. Rather, what we look to do is to see whether granting a lien on avoidance actions is appropriate to secure the post-petition lending or to provide a substitute lien or alternative means to provide adequate protection."

As Mr. Huebner properly observed, proceeds of avoidance actions are property of the estate. So there's nothing inherently wrong with allowing them to be used to satisfy claims in order of priority. But he also recognized pre-petition security interest did not attach to avoidance action proceeds. So the real issue here is whether I should allow adequate protection liens and super pri entitlements to latch onto them now. That's a fact-intensive inquiry, but here I think that under the facts here it's appropriate to allow them to be available for the purpose of securing post-petition loans and providing adequate protection, and I'm going to permit them now.

That's especially so since I note now, as I noted at the interim DIP hearing, that all payments under the rubric of

adequate protection are, quote, "on account of," quote, adequate protection entitlements, and they're only to compensate pre-petition secured lenders for the diminution, if any, of the value of their collateral.

To the extent we're talking about lenders whose only claim to avoidance proceeds is by reason of adequate protection entitlements, the lien on avoidance action proceeds is subject to the same limitations, of course.

506(c) waivers: I also agree with Mr. Huebner that, for the most part, the purpose of 506(c) is to protect assets not subject to liens from expenditures for the benefit of preserving secured creditors' collateral. I note that he said that was the, quote, "primary," purpose, and I said, quote, "for the most part," quote, because there may be circumstances where a case is doing badly and is being liquidated in Chapter 11 or converts to Chapter 7 at a time when all of the value goes to the secured creditors, and the debtor or Chapter 7 trustee is effectively running the case for the secureds.

In that event, we often require that the secureds pay for the continuing maintenance of the case for their benefit. And if the secureds don't want the judge to simply give them relief from the stay so they can liquidate their collateral on their own out of court, they have to pay for the expenses of having the trustee maintain and liquidate their collateral for them. So, normally, we permit 506 waivers if, but only if,

they have appropriate carve-outs. Here, we have that, and the 506 waivers are thus permissible.

Thus, I don't need to decide and do not decide whether a creditors' committee has the standing to object to 506(c) waivers in instances in which such waivers might not be appropriate under the facts of those other cases. I heard the lenders' contention that only debtors can be heard on 506 waivers after Hen House. While I have some material doubts as to whether the lenders are right in that contention, since there is a Section 1109 of the Code that gives parties in interest the right to appear and be heard on any issue, I don't need to decide that today.

That completes my discussion of the Farmland factors. Subject to the adjustment of the milestones and the maturity date to permit the management of my calendar and my ability to hold multi-day hearings and decide disputed matters, the creditors' committee's objections are overruled.

Turning now to the objections by the Bank of New York. Bank of New York, as indenture trustee under the two indentures for the ARCO and Equistar noteholders, also objects to the financing. For the reasons that follow, its objections, too, will be overruled.

First, Bank of New York argues that there has been an insufficient showing of benefit to Lyondell Chemical Company, ARCO's successor, or Equistar. I reject that as a finding of

fact, or to the extent applicable, as a mixed question of fact and law. Neither company could survive without the DIP financing proposed here, and each would then have to liquidate.

Additionally, there will be many periods when Lyondell Chemical Company and Equistar will be net takers, borrowers under the DIP facility. Though that will not always be the case, and there may be periods when one or another of them is a net lender to non-debtor affiliates, they will be protected by the intercompany obligations that have the second highest liens.

Also, as I found in my preliminary injunction decision earlier this week, and find again on independently submitted evidence here, the debtors function as an integrated group of affiliated companies, and we can't measure the benefits to any individual debtor solely by the amount of borrowed cash that's in its till at any particular period of time.

Bank of New York also argues that it isn't getting the same adequate protection that other pre-petition lenders are getting, and that this is improper. Well, the premise is correct; the conclusion isn't. Bank of New York is entitled to adequate protection, but there's no requirement in the Code that the adequate protection provided to each party otherwise entitled to protection be identical. Rather, each party entitled to adequate protection is entitled to whatever it takes to protect its interest; no less, no more.

Here, Bank of New York has received a lien on a much greater collateral base, and while its obligors are liable for a considerably larger body of indebtedness, that being the price they pay for staying alive, the evidence shows an equity cushion of about nineteen percent nevertheless, well in excess of the ten percent that we customarily require as a satisfactory equity cushion.

Then, Bank of New York argues concerns arising from argued substantive consolidation. While Bank of New York contends that the DIP results in a de facto substantive consolidation, I don't agree. Intercompany obligations remain and they are secured at a very high level, protecting the ability to recover from other debtors.

Bank of New York also objects to provisions in the documents under which it would have to waive its right to marshaling. Its marshaling right was a pre-petition right in connection with debt that was primed and for which it now has adequate protection. And since it now has a lien on all of the debtors' assets, including ABL collateral on which it never had a lien before, there will be no occasion to apply marshaling with respect to the post-petition period.

Bank of New York also objects to the inability to participate, presumably not on its own behalf but, rather, the inability to participate of its various public noteholders in the roll-up loan. I find as a fact that the roll-up loan was

not offered to provide adequate protection, but, rather, was an element of the consideration offered to those willing to lend new money that the debtors badly needed. As Bank of New York was already secured -- excuse me, adequately protected, it was entitled to no more in the way of adequate protection under this rubric.

For all of these reasons, Bank of New York's objections are overruled.

Turning now to the objections of Law Debenture Trust Company: Law Debenture Trust, indenture trustee on behalf of holders of unsecured notes issued by debtor Millennium America, also objects to this facility. It argues that its equal and ratable clause requires it to be granted a lien to keep it *pari passu* with newly issued secured debt and expressly or impliedly that it's entitled to adequate protection as a result.

In In Re Allegheny International, 93 BR 907, Judge Cosetti of the Western District of Pennsylvania dealt with this exact issue. There, too, indenture trustees had provisions in their bond indentures that provided that if the bond issuer was granted a security interest in their assets, the debentures would be secured equally and ratably.

When the debtors proposed to grant those security interests in the course of the Allegheny International Chapter 11 case as part of a 364 motion, they asked for adequate protection for the security interests that would arise by

reason of those clauses in their indentures.

Judge Cosetti ruled that the equally and ratably clauses were more than negative pledges and that they constituted an equitable lien, but he noted that whatever lien the indenture trustees had was unperfected and couldn't be perfected because of the automatic stay. He stated:

"Simply stated, the trustee or debtor-in-possession has the power of a judicial lien creditor as of the date the bankruptcy petition is filed, including the right to avoid any liens that are unperfected as of the filing date. Since unperfected liens are avoidable, then the interests of the indenture trustees, in this case First Chicago and U.S. Trust, must also be avoidable."

He went on to say:

"For the above reasons, First Chicago's argument that it has an interest in property which is entitled to adequate protection pursuant to 11 U.S.C. Section 363 must fail."

And I'm skipping:

"Since the alleged lien is voidable, First Chicago lacks an interest in property entitled to adequate protection." 93 BR at 909 to 910.

Judge Duffy held to the same effect in this district in In Re McLean Industries, 162 BR 410 at Page 421, citing,

among other authority, Allegheny. As Judge Duffy held, a restrictive covenant is not a perfected security interest or a property interest that's valid against a debtor-in-possession or trustee under the Bankruptcy Code.

Nor is there a basis for Law Debenture's other contention that Millennium America was bound by covenants in its documentation effectively capable of being enforced by specific performance that it could enforce against the debtors or the lenders, even though those covenants might impose caps on other debt. Except in the rarest cases, and certainly not in financial contracts, we don't enforce by specific performance covenants in pre-petition documentation. Upon the debtors' default, the bonds accelerated and rights to specific performance ceased. And the underlying obligations were a financial accommodation which were incapable of assumption and which, without doubt, the debtors never assumed.

As the last of the written objections, ABN AMRO has filed a limited objection to the approval of the term loan facility. It doesn't raise any objections to the ABL facility. ABN AMRO argues that language in Paragraph 10(e) of a Draft Amendment No. 2 to documentation relating to the pre-petition senior secured loan to which debtor Lyondell Chemical is a party, but which doesn't substantively affect Lyondell or any of the other debtors for which Lyondell is agent, adversely affects ABN by reason of potential dilution of ABN AMRO

recoveries from non-debtors. Thus, it asks me to delete language in the proposed approval order that might prejudice ABN AMRO's rights in that regard and ask me to maintain neutrality with respect to intercreditor issues.

The debtors argue that this is purely an intercreditor issue and that I should not get involved in it for that reason. They further argue that it's not a Section 364 issue and doesn't go to approval of the facility.

I agree with the debtors in that regard. I agree that it is indeed an intercreditor issue, that it does not involve Section 364 or approval of the facility, and that I should not get involved in it. And I also think that, for that reason, I should remain neutral. And because of that, I believe that I should delete any language in my order that tips the scales in any intercreditor dispute and that, upon request, I should include appropriate language in some order, either this one or, if it's more practical in another one, not necessarily requiring changes to be made in underlying documentation that makes it clear that by my authorizing any of the debtors to execute the loan documentation I'm not deciding any issues that might arise solely between other creditors.

Thus, the text in Section 10(e) on Pages 34 to 35 of the document that I was provided should be deleted. If you can draft mutually satisfactory language for some order, either this order or, if it's more practical, a supplemental one that

makes it clear what I'm not deciding and that explicitly states and confirms my intent to stay neutral, I'll approve it.

Turning last to the objection of the taxing authorities. By an oral objection that I considered, even though it failed to comply with my earlier orders, certain taxing authorities who have liens on debtor property to secure payment of taxes due to them object to the DIP facility priming their tax liens. Their concerns as to pre-petition liens were consensually resolved, but they object insofar as the DIP would prime any post-petition liens they might have if the debtors failed to make necessary tax payments to them in the post-petition period.

In essence, each of the lenders in the tax authorities' claims the first priority to the proceeds of assets that are the subject of their respective claims of lien. I rule that the priority must go to the lenders and, thus, that the tax authorities' oral objection must be overruled.

I do for two reasons: The first, and more important of them, is the supremacy clause of the United States Constitution, and because a valid exercise of the federally granted bankruptcy power must take priority over state law to the extent inconsistent. In Butner v. The United States, 440 U.S. 48, the Supreme Court stated:

"The federal Constitution, Article 1, Section 8, gives

Congress the power to establish uniform laws on the

subject of bankruptcy throughout the United States.
In view of this grant of authority to the Congress, it has been settled from an early date that state laws, to the extent that they conflict with the laws of Congress enacted under its Constitutional authority on the subject of bankruptcies, are suspended."
440 U.S. at 54, Note 9.

Second, perhaps as a flaw in the drafting of the Bankruptcy Code, one of the many drafting flaws in the 2005 BAPCPA amendments, but nevertheless, by reason of the Code's seemingly unambiguous language, the taxing authorities' liens that are subject to the liens I can grant under Section 364(c)(1).

Section 364(c)(1) of the Code provides in relevant part:

"If the trustee is unable to obtain unsecured credit allowable under Section 503(b)(1) of this Title, as an administrative expense, the Court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt with priority over any or all administrative expenses of the kind specified in Section 503(b) of this Title."

Then we have to go back to look at the priorities that are set forth in Section 503(b). It provides, in relevant part:

"After notice and a hearing, there shall be allowed administrative expenses, including any tax incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both."

Of course, the debtors showed long ago that they couldn't get unsecured credit as an administrative expense. And I don't think there's any real doubt that the taxing authorities' taxes are covered under Section 503(b)(1)(b). When Section 503(b)(1)(b) was added to the Code as part of the 2005 BAPCPA amendments, taxes of the character in question here were picked up in Section 364(c)(1) by its incorporation of Section 503(b)(1) as amended -- 503(b) as amended. Forgive me. And Congress provided that a Section 364(c)(1) lien could trump liens of the type covered under Section 503(b)(1)(b).

Now, folks, I'm not sure if that was intentional. It's my impression that the BAPCPA amendments added the language in 503(b)(1)(b) at the behest of lobbyists for the taxing authorities, and presumably the lobbyists were trying to give taxing authorities a leg up rather than to hurt their clients.

But we judges look to the Congressional intent, not the lobbyists, and the Congressional intent is expressed by the statutory language. Where statutory language is unambiguous, we follow it.

While Section 364(d) of the Code would at first glance also seem to apply, as the lenders would additionally be getting a priming lien as to which they then have to offer adequate protection, the lenders may, if they wish, rely on Section 364(c)(1), as Congress has by the more specific language of Sections 503(b) and 364(c) indicated how, quote, "property taxes for which liability is in rem," are to be treated.

Thus, the lenders may assert priority under Butner and Section 364(c)(1).

Finally, to the extent other objections were raised and not resolved, and I haven't discussed them, they're overruled. All right.

Not by way of re-argument, are there any mechanical issues that I need to deal with? Mr. Davis, you rose a long time ago.

MR. DAVIS: No, Your Honor. I did rise, but I rose because I wanted to -- I know that this case has placed upon Your Honor, your law clerks and your staff tremendous burdens, in particular in connection with this DIP financing motion and in connection with the preliminary injunction motion. On behalf of the debtors, and I think I'm probably speaking on behalf of all parties in interest, we thank you for your time and attention to these critical matters in this case.

THE COURT: That's my job, Mr. Davis, but thank you.

MR. WEISFELNER: Your Honor, I wanted to rise to express the exact same sentiment and to congratulate our adversaries on a case well presented and well argued.

THE COURT: Very well. Thank you.

All right. Mr. Siegel?

MR. SIEGEL: Just wanted to chime in and say the same thing, Your Honor. Thank you.

THE COURT: Sure.

UNIDENTIFIED: Your Honor, I'm going to feel left out if I don't as well, but we do thank you very much for your time on this matter.

THE COURT: Okay. Well, thanks. You don't need to repeat yourselves at this point.

(Laughter.)

THE COURT: How do you folks want to deal with the finalization and submission of the order? Do you want it entered tonight? Ms. Blum is waiting for you, but out of courtesy to her, if it's going to take more than maybe half an hour or something like that, I would like to consider whether we can either e-mail it to her for her to enter later tonight, or for you to polish it over the weekend. I'm going to be here on other matters, coincidentally involving this case, tomorrow and Sunday. You can e-mail stuff to my chambers and/or to Ms. Blum, and I think, but I'll have to confirm for you, that she can enter it over the weekend and/or if you want me to so order

the record, I'll do whatever your reasonable needs and concerns can best be accomplished by doing.

Mr. Davis?

MR. DAVIS: Your Honor, if you would so order the record? And what I would like to do in light of all of the time, attention that this Court and Ms. Blum have put to this matter over the last number of days, I would suggest that we allow parties an opportunity to take a look one last time at the order and that we ask that anyone provide us comments by tomorrow at 10:15 -- at about ten o'clock in the morning, and we'll endeavor to get the order entered over the weekend. I think that will be satisfactory for our purposes.

THE COURT: All right. Fair enough.

I'll provide to you, Mr. Davis, or your designee the wording that I changed on Section 6.18.

MR. DAVIS: Thank you, Your Honor.

THE COURT: Any further business?

(No verbal response.)

THE COURT: Then we're adjourned.

(Proceedings concluded at 8:08 p.m.)

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CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

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____ March 5, 2009

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